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THOUGHTS
ON THE ORIGIN OF
FEUDAL TENURES,
AND THE DESCENT OF
ANCIENT PEERAGES,
IN SCOTLAND.

Addressed to * * *.

By GEORGE WALLACE, Esq; Advocate.

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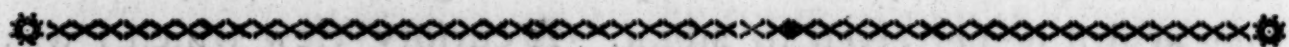
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TH O U G H T S
ON THE
ORIGIN OF FEUDAL TENURES,
AND THE
DESCENT OF ANTIENT PEERAGES IN SCOTLAND.



B O O K I.

Peerages were not introduced into Scotland till the
year 1587.

• MY LORD,

PROFOUND or abstract researches, requiring much intense
and continued thought, fatigue and overwhelm vulgar minds:
Other speculations, less remote, perhaps, from common apprehen-
sion, often, either from their apparent minuteness, or from their
seeming insignificance, carry an unpromising and barren air: And

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both sorts, unengaging except to a few, and disrelished by the multitude, amidst dissipation and prejudice, frequently meet with a cold reception in the world. Hence, in order to give a relief to the dreaded jejuneness of their works, writers are sometimes seduced to seek after entertaining embellishments, more than is entirely consistent with that strict propriety which a good taste and just criticism demand in every literary production. Amidst these discouragements, the numerous claims which have been lately entered to antient Scotch peerages, and the many questions agitated concerning their legal descent, have engaged me to venture on composing a Discourse on that important article of public jurisprudence; and, possibly, the subject, amidst a contrary appearance, will ultimately be found, in general observations, and in extensive disquisitions, to be susceptible of greater variety than it may at first be perceived to admit. A cursory view which I was occasionally called to take of this matter, led me to suspect, that, in treating it, a due attention had not been bestowed either on the constitution of parliament, or on the nature of honours in Scotland. It is reasonable to suppose, that both would have some influence in regulating the descent of nobility: A fuller recollection brought me to believe, that this influence must have been considerable: And I thought it highly probable, that modern lawyers, forgetful of the antient state of North Britain, had here been led into errors, both in their arguments and in their opinions, by ideas prevalent at present in both kingdoms, which, however just in themselves, cannot be applied to the objects in question. The hints, which had gradually suggested themselves to my mind, the magnitude of the business to which they relate, excited me to prosecute; and, having at last formed something that approached towards a system, I determined not to delay executing

cuting a design I had long entertained, of submitting to your Lordship the result of my inquiry.

The view I exhibit of the dignities of Scotland will probably appear new; and my principles may be hastily rejected by others on that account. But observations which might justly be deemed trite, even such as had been anticipated by former writers, should form an entertainment unworthy of being presented to * * *. The novelty of those produced in the sequel, if they be in any degree possessed of that quality, it would, my Lord, be affectation to conceal, is the very circumstance that principally emboldens me to esteem them not improper to be laid before a leading member of that august tribunal, which is frequently called, in delivering advice to the crown, to judge of pretensions to honours; and, I am certain, will not alone render them unacceptable to your Lordship's superior ingenuity. Your liberal turn and enlarged understanding permit not your mind, in any case, to decide in an unphilosophical and precipitate manner. I flatter myself that you will attend to the facts submitted to your consideration, will examine the proofs offered of their truth, will scrutinise the reasoning founded on both; and allow me to add, that you will acquiesce in any of the following conclusions which you may find accurately deduced from premises properly established.

Men, used to behold hereditary seats acquired in the legislature by peerages, are apt to imagine that an intimate connection subsisted anciently between that sovereign privilege, and those same titles to which they find it united in their own days, and to conclude, that a right to sit there always constituted the pre-eminence

intended to be conferred by them. Nevertheless, a little reflection, bestowed on a few facts which are universally agreed to be incontrovertible, will evince the proposition to be fundamentally erroneous. Titles of honour, and degrees of nobility, as well as distinctions of rank, were early known in Scotland; but I suspect, that before 1587 they had not in this country any dignities entitled to be denominated PEERAGES.

In ancient times, attendance in parliament was accounted a burden, not esteemed an honour. All vassals, who held their property of the crown, were bound to assist with their counsel in that high court: And this service opening not a road either to preferment or to pleasure, a great unwillingness, not wholly unnatural, was very generally entertained to discharging an obligation, which could not be fulfilled without travelling, perhaps, from the remotest regions of the kingdom, and during tempestuous weather, at a considerable expence, by paths almost impassable, and through a country exceedingly barbarous, not affording tolerable accommodations, or infested by hostile names. Performance of it was obliged to be compelled by penalties, and fines were imposed on absentees. It is not, therefore, in itself likely, that men would covet an attainment, which, instead of bringing advantages, bound to a labour from which people were generally solicitous to be exempt.

A peerage I understand to be "a state or dignity merely personal, which confers, on the persons elevated to it, an exclusive and hereditary right to sit and to vote in the legislative body, by blood, and without election." Every freeholder, or "owner of lands held of the Sovereign in chief," was entitled,

as

as well as bound, by the laws, and by the constitution of the parliament of Scotland, to sit and to vote in that assembly; and a distinction was not anciently made between large or valuable, and little or inconsiderable estates. Every freehold, small as well as great, undignified as well as dignified, both bestowed a right, and imposed an obligation on its owner, to attend in the general council of the nation. Representation and election were not introduced into counties till the year 1587, in which a statute was passed, establishing that mode, and excluding the freeholders from sitting in person. The view, therefore, in which titles were granted before 1587, could not be to confer inelective seats in parliament. The rarity of objects, and even the difficulty of acquiring them, both enhance their value, and augment the eagerness with which they are pursued: Commonness, and the increased facility with which, in consequence of it, things can be procured, detract from their estimation: And almost every person who chose might obtain a seat without suing to Majesty for the favour. A single acre, an easy purchase, bestowed a good qualification; and an ordinary possession, attainable by all the world, could not form either a rare distinction or a prized acquirement.

Dukes, Marquisses, Earls, Lords, Barons, Freeholders; all enjoyed hereditary voices in the supreme convention. The characteristic difference, by which those ranks were discriminated from each other, could not consist in a common quality which pertained equally to them all. Either every proprietor of a fief held of the King must be asserted to have been lord of a Peerage, or you will not find that order in the old parliaments of Scotland. The
Barons

Barons * and the Freeholders, it is universally allowed, were merely commoners. The other members, the Lords, the Earls, the Marquisses, and the Dukes, might be noble, but, considered in their legislative relation, could not be peers. In fact, I believe that no instance can be produced of any nobleman, who was not possessed of considerable landed property, and, of course, entitled to sit in the senate, before his elevation to that degree.

The Scotch parliament, your Lordship knows, consisted of three different estates; the spiritual faculty, or the clergy; the landed interest, or the barons; and the trading people, or the burghesses:

* In England, a Baron signifies a Lord, or nobleman of the lowest order of peerage. But, in Scotland, a barony does not imply nobility: A baron, in the proper sense of the word, means an owner of a landed estate united under this particular denomination, and is generally understood rather of a commoner than of a peer; and the term is often used, even in a larger signification, for any proprietor of ground. *Leg. Malc.* II. c. 1. and *Skene's* note on that passage. *Craig de Feudis*, L. 1. d. 12. § 16. *Skene*, word *Baro.* *Lord Viscount Stair's Institutions*, B. 2. t. 3. § 2. B. 3. t. 6. § 9. *Macdowal's Institute*, B. 2. t. 3. § 83. 85. *Erskine's Institute*, B. 1. t. 3. § 3. B. 3. t. 8. § 17. *Parl.* 1427, c. 102. of the old edition, commonly distinguished under the name of the *Black Acts*. Hawthornden, in his account of the preparations which were made by James V. towards the end of his reign, for invading England, says, "The Earls of Caffillis, Glencairn; Lords Fleming, Somerville, Erskine; Barons Ayton, Langton, Ormeston, Waughton, and many others, accompanied with the King's domestic servants, ride to the west borders:" And in the next page, speaking of the defeat of the Scots, he adds, "The Earls of Caffillis and Glencairn; the Lords Maxwell, Fleming, Somerville, Oliphant, Gray; Robert Erskine, son to the Lord Erskine, Oliver Sinclair; the lairds of Craigy, Ayton, Langton, Ormeston, Waughton, many of the King's domestic servants, were taken prisoners." *History of Scotland*, p. 294. 295. of the edition printed at Glasgow in 1749. — *Pitcottie's History of Scotland*, p. 288. 300. of the edition printed at Glasgow in 1749. *Parl.* 1489, c. 28. *Parl.* 1597, c. 276.

gesse: And the nobility, instead of sitting there in a house by themselves, or of forming an estate distinct from the other estates, constituted a part of that composed by the landed interest, of all the Freeholders indiscriminately, nobles as well as commons *.

All the three estates met in one chamber. The members formed only one house. Their names were entered in one roll: And even their votes were commonly given promiscuously. One speaker presided over the whole: The speeches made in parliament were all addressed to one president †: And this dignity was at last annexed to the chancellorship ‡.

Each estate possessed a distinct authority, and, independent of the other two, might hold consultations apart by itself, on any matter brought before parliament. The individuals present, who belonged to it, on gathering the sentiments of the body, which were both determined and collected by majority of voices, might dissent from resolutions taken by the other two bodies, and, by exercising that right, could put a negative on any act proposed by them. No bill, from which any one estate, or a majority of it, entered a dissent, could pass into a law. But, my Lord, in this particular, the peers enjoyed not a corporate capacity: Even the whole body, concurring in one unanimous voice, possessed not the prerogative of control. Their suffrages were mingled among those of the other freeholders; and no superiority pertained to the nobles in that respect. For many years after 1587, the nobility

* Parl. 1457, c. 68. Parl. 1471, c. 61. Parl. 1477, c. 87. Parl. 1489, c. 28. Parl. 1621, c. 3.

† Political works of Andrew Fletcher, Esq;

‡ Parl. 1641, c. 5. Parl. 1661, c. 1.

bility had not yet been dissevered from the gentry. It was not earlier than 1689, that, on the abolition of episcopacy, they were finally * erected into an estate distinct from both the barons and the burgessees.

Recapitulation.

Every freehold, before 1587, gave an inelective seat in parliament: That court consisted of three estates: The nobility formed only an incorporated part of that estate, which was composed indiscriminately of all the freeholders; and they possessed no more than a numerical proportion of the aggregate authority belonging to the collective body of barons. These facts are not probable conjectures merely; they amount, my Lord, to decisive proofs, that, in ancient times, an order of men, who could justly be termed Peers, existed not in Scotland. Every particular recorded about that senate, those which are trivial, no less than those which are important, concur to establish the proposition. Several striking circumstances, which seem hardly explicable on any other supposition, and which, therefore, will be admitted to confirm it, shall afterwards be mentioned †. Meanwhile, your Lordship's penetration must already have anticipated the conclusion to which that principle leads, and which renders it of moment: I mean, my Lord, that, from the way in which titles of honour descended before the year 1587, no just inference can be drawn concerning the line in which peerages of parliament are descendible at present, or, in other words, that, in determining on claims entered to the latter, little, or rather no regard ought to be paid to ancient possession of the former. The substantial dignities, which in our days are enjoyed by the hereditary counsellors of the English crown, and which aggrandise them,

* Parl. 1640, c. 2.

† Book V.

them, are materially different from those honorary appellations which were born of old by the Scottish nobles; and a conclusive argument cannot be brought from things which had an existence to such as were not in being. I infer, that every Scottish honour, which appears to have been possessed by a female before 1587, must not be erected on that pretext into a feminine peerage *.

B

BOOK

* See Note (A.) at the end of the volume.

B O O K II.

Territorial Honours.

MY LORD,

MEN accustomed to read, in the Scottish history, of persons distinguished by the appellations of Lord and of Earl, I doubt not, will startle at finding it asserted, in contradiction to the notions formerly entertained by them, that, even in the sixteenth century, peerages existed not in Scotland. But your Lordship's free spirit is not less attached to truth, than your uncommon accuracy is incapable of confounding with each other objects, which, however resembling, are in themselves essentially different; and even the few remarks, already made on the primitive constitution of the Scottish parliament, will be perceived by your penetrating mind to be conclusive on that assertion. The proposition, indeed, hitherto attempted to be established, is negative only; and those whose prejudices are offended by it will probably demand, for their complete satisfaction, a positive explanation of the genuine nature of Scottish honours. If not Peerages, it is natural to ask, What were they? To this question a full answer can hardly be returned, without going into a detail concerning the antient condition of North Britain, and endeavouring, in the
coincidences

coincidences which led to the creating of honours, and in the ends proposed to be attained at introducing them, to trace their origin in that country. With this view I shall indispenfably be engaged, out of refpect to an opinion which is not infrequently held concerning them, to premise fome obfervations on the rife of proprietary authority and of feudal tenures, among the Scots. Another important ftep will thereby be made in our argument. It will be difcovered, that noble dignities were not FEUDAL JURISDICTIONS; and, on afcending to their fource, it will appear, perhaps, that, in Scotland, before the year 1587, they were mere titles, originally conferred on lands, rather than granted directly to perfons.

P A R T I.

Nature of Territorial Honours before the year 1587.

S E C T I O N I.

Origin of the Authority annexed to Property in Lands.

IN ancient times, that country was wholly unenclofed, and its inhabitants were extremely barbarous. Their conceptions of property, a tranfitory relation which has been afcertained by experience to be involved in nice diftinctions, and in juridical fubtilities, were confufed and dull; and their moveables, confifting moftly

Extreme
barbarifm

of cattle reared by Nature on bleak mountains, and ranging at liberty in open heaths, like their hares and their grouse, tempted continually to depredation. Their ideas of justice, and their sentiments of humanity, infected by the wildness * and the ferocity amidst which they were generated, were confined in their objects, as well as languid in themselves: And government and laws, by which order, and perhaps morality, are promoted in society, not having attained among them, either from apparent utility, or from long establishment, the reverence and the vigour, without which their influence in restraining violence, and in maintaining right, must ever be limited and feeble, private persons were necessitated to form among themselves leagues for obtaining, by their own arms, that protection which the magistrate could not ensure to them against rapine and invasion †. Hence those associations, which, under different denominations, are very generally found in uncivilized nations, and which, in the mountainous parts of Scotland, still subsist under the name of Clans.

produced
those mili-
tary associa-
tions termed
Clans.

The connections on which these confederacies were erected could not be entirely arbitrary. Institutions, not founded in nature, want solidity; and fabrics built on an unstable foundation cannot be durable. It was chiefly in the full enjoyment of their property, that those who associated proposed by confederation to be maintained; a circumstance which immediately suggests a principle adapted to form a basis of their union. A man to whom lands belong is deeply interested in protecting those who occupy them. His tenants must be disabled to pay their rent; and he cannot justly demand it, unless their possession be undisturbed. Their houses,

* Pitfcottie, p. 27.

† Parl. 1503, c. 93.

houses, their cattle, their crops, their labours, all must be safe; and his security is not a matter indifferent to them. Their farms are not only derived from his consent, but held under engagements contracted to him: It is always convenient for them to participate of his favour: They cannot reasonably expect aid, unless they be willing, on their own part, to lend it: And none of them, in his separate capacity, can possess the strength, or excite the awe, which may result from their combined efforts. The relation, therefore, created between the owner of an estate, and those who possess it, binds them reciprocally to each other; and among an untamed fierce people, an association, originating in necessity, came naturally to be formed on this relation between them for their mutual safety.

No military power can attain its utmost possible force, or make the greatest possible impression upon its enemy, unless its operations proceed on one regular consistent plan, executed by the united exertions of all the individuals employed to perform each detached part. Its various members must compose only one body, which must be actuated by one soul: Its conduct must be directed by one understanding: One will must determine its movements: Every limb must co-operate in making them: Otherwise, the advantages attainable from a complete junction of their whole vigour will not be gained; and they may, from ignorance, either obstruct the general design, or even, in different quarters, counteract each other's endeavours to forward it. The authority, therefore, by which troops, whether irregular, or regular, are commanded, admits not of division; but, amidst the gradation required among them, one universal superior, whose orders should be implicitly obeyed,

obeyed, must be acknowledged in every body which pretends to be deemed an army.

Among the different possessors of any grounds, the person who would commonly be allowed, on a competition, to have a preferable pretension to the supreme command, is the proprietor to whom the lands belong. It is not to be expected that the rest, holding themselves nearly on a level with each other, should submit without resistance or disdain to an equal; but in their Lord they recognise one greatly elevated above them by fortune, to whom it will not offend their pride to act in a subordinate sphere. Their thoughts, naturally conveyed to his castle, are concentrated there; and, even on a free election, the general voice would readily confer that distinction spontaneously upon him.

The vicinity of the dwellings of those who reside in an estate, permits them to be assembled, occasionally, on short notice; and the purpose, for which they are supposed here to erect themselves into a militia, requires not that they be constantly in arms; a servitude hardly compatible with either their rural labours, or their other business: But they must always be ready, at the sound of the flughorn *, and at sight of the fiery cross †, to march in array, even to their frontiers, in defence of their territories, of their adherents, or of their goods. The power, therefore, lodged in their commander, must necessarily last as long as the connection on which

* The parole by which clans were distinguished in Scotland, and, on alarms, were summoned by their chiefs to the field. Sir G. Mackenzie of Heraldry, ch. 33. Pit-scottie, p. 213.

† The signal by which alarms were given, and clans were convoked on them.

which it is originally founded subsists between him and them, or as he remains proprietor of the grounds, and they continue to reside in them.

In that power, my Lord, your Lordship will discover an authority annexed, in the natural course of things, to lands; and a civil jurisdiction, as well as a military command, may be supposed, without any improbability, to have been derived from them to their owners, in some cases. Dominion, it is commonly said, follows property, which supplies the means of conferring favours, of shewing kindness, of creating attachments, of cultivating friendships, of inspiring respect, of raising expectations, of purchasing tools, of exciting apprehension, and of discomfiting or intimidating opposition. Poverty and dependence are usually accompanied with bashfulness and with timidity: Grandeur and wealth are arrogant, and even imperious: And few people have resolution to despise the frowns, or to resist the dictates of superiors, with whom they find themselves disabled to contend. In those wilds of Scotland, whose present condition approaches nearest to the savage rudeness of antiquity, tenants and cottagers, ignorant of the means of obtaining redress of their wrongs, or unable to defray the expence of actions at law, are frequently obliged, even in our days, to bear, in a mournful silence, great insolence and much oppression. Distressed as, in ancient times, husbandmen were there by penury, they were necessitated to submit, without murmuring, almost to any powers which personages, on whose caprice their tranquillity and their subsistence depended, were pleased to assume. Messages which would be sent them, requesting payment of the rent stipulated at taking their farms, at first perhaps expressed in civil terms, would quickly be converted, on

Proprietary
jurisdictions.

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Proprietary
jurisdictions.

a refusal, or on a delay, into stern orders, which durst not be disobeyed. Hence the owners of lands might, and probably did, acquire, by acquiescence and by custom, a right to pronounce, either by themselves or by deputies, decrees for performance of the obligations contracted by those to whom their grounds were let: And similar causes would gradually draw to them a power of judging in other matters. Persons who had any demands on their neighbours, or who had been injured by them, would naturally communicate the business to their landlord, on whom a close connection entitled them to rely for protection, and of whose mightiness they knew that the ideas formed by their adversaries, as well as by themselves, were exceedingly lofty. This potentate, before taking his resolution, would of course send for those against whom a complaint had been directed, and would inquire into the affair. In cases in which important facts could not easily be adjusted, both parties would be confronted in his presence; and his decision, pronounced on examining the matter, would import a command not to be disputed by either. A landholder would thereby be exhibited to those who occupied his estate, invested with a double character, of their judge in peace, as well as of their leader in war; each derived from the circumstances in which affairs were then placed: Parties would be sifted before him; their claims would be discussed; judgements would be given by him; and his sentences would be executed.

The haughty appellative, MASTER *, is the correlative term still used for LANDLORD, even in the judicial proceedings of Scotland; a strong proof of the severe despotism exercised there, in ancient times, over those useful citizens, the labourers of the ground. The

* Parl. 1493, c. 79.

The awe with which his person was regarded by them, co-operating with affection and with habit, ensured from his tenants an indiscriminate obedience almost to any mandates issued by him; and his dependents would not probably be either disposed to examine his commands with accuracy, or able to distinguish cases with nicety. Nevertheless, amidst an authority, which, on its original bottom, among a rough people, in a tumultuous state, might long be dubious and vacillant, a little discernment would soon suggest that he ought not, presuming on their servility, to act entirely without caution, but that it would be prudent, if possible, to acquire for his judgements that weight which general approbation should add to them. In his deliberations, therefore, before determining himself, he would naturally hold counsel with a respectable number of his clan: His decrees, after having consulted them, it would be indispensably necessary to conform to their opinion: Sentences, founded in verdicts returned by the neighbours and the equals of those against whom they had been given, would thence derive much solidity: And resistance would never be made to their execution, unless, perhaps, either their extreme oppressiveness exciting a general alarm, or their revolting novelty shocking established modes, should impel inflamed spirits to sudden mutiny.

An authority, which rests solely on the presumptuous confidence of him who assumes, and on the voluntary submission of those who appeal to it, cannot well attain perfect stability, or even possess an indisputable title to the appellation of jurisdiction, till it either be expressly recognised for legitimate by that sovereign power, whose act can directly bestow a constitutional existence upon it; or be tacitly confirmed by age, a reverend quality, which, inspiring an immediate perception of the great durability of an-

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cient objects, excites an impression, as if, by length of time, they had acquired an immutability, and diffuses over them a venerableness that causes them in some sort to seem sacred. The jurisdiction incident to property, would, therefore, be at first indeterminate in extent, as well as irregular in exercise; but, being susceptible both of regularity and of precision, would be defined by degrees, and come at last to be settled with firmness. During many centuries after the Pictish empire had been subjugated by Kenneth Macalpin, even one supreme legislature was not universally acknowledged, or not firmly established, in Scotland: The inferior authorities, the judicative and the executive, more impotent than the legislative, could scarcely reach all over the kingdom: The country was rather subdivided into a vast number of small states, not easily accessible either to the general declarations, or to the particular interpositions of national equity. The only force then kept on foot was the undisciplined militia, which has been described, but which was little acquainted with any officer superior to its Lord, or was not used to receive orders from another; and a few words uttered in a grave tone by a distant court, composed of ordinary men distinguished by fantastic robes, and encircled with official pageantry, to strike a confounding amazement on beholders, which, under regular politics, are able to terminate any controverted matter, were not always heard then with profound deference. A person resembling a magistrate was already found in every estate; and it is generally agreeable, as well as convenient, especially for people whose residence is fixed at a distance from the capital seats of public justice, to sue for it, if obtainable, in a tribunal neither overloaded with business, nor far from their homes, from which a decision may be expected at little expence and in a short time. Administration was unable, without his permission,

permission, to execute its ordinances within his domains, otherwise than by engaging a potent neighbour to carry sword and desolation into his territories, and, in consequence, by increasing those disorders which wise politicians are ever studious to prevent. Government, therefore, sensible of its imbecillity, was obliged, by delegating in a formal manner some portion of its judicative power to the proprietors of lands, to bestow legality as well as exactness on the jurisdiction usurped by them.

S E C T. II.

Origin of Tenures.—Their Antiquity in Scotland.

ALL dominion, which, without increasing the labour, adds to the importance of its possessor, seems in its nature to be somewhat elastic: That which is bounded, you will generally observe, incessantly maintaining a struggle to expand itself: And an officer, constantly surrounded by retainers prompt to enforce submission to the determinations of his will, can hardly be expected, from moderation or from virtue, not to yield to the seductive charms of a brilliant acquisition. The authority, therefore, incident to landed property, could not always be confined to tenants, the only persons who have hitherto appeared to be the subjects of it. In process of time, it would be extended to others, whose rank was higher, and whose right was perpetual. This effect would be produced by alienation. A man who dissolves every connection which he ever had with a parcel of lands, except the sorrow na-

Authority
annexed to
property
might be re-
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tural to feel at parting with an object, towards which, having been long accustomed to call it his own, his eyes must frequently return with fondness, ceases to be interested either in themselves or in their inhabitants: A total annihilation, therefore, of the influence here supposed to arise to the owner over the occupants of an estate, cannot be important to him after their relation is wholly loosed by an entire alienation, especially if his family moves to a distance. But to one who disposes of only a part of his property, it can never be indifferent to rear in his neighbourhood a strange power, independent of himself, which, becoming hostile, may soon attack his reserved lands. Hence in old times, in which money was scarce, but barbarity abounded, and every man looked with jealousy on his neighbour, other transfers, than those caused necessarily by descent from the dead to the living, could not be frequent. Nevertheless, partial alienations would sometimes be made.

Before the vast objects of pursuit, which have been found to exist in the Indies, had been laid open by the discovery of those regions, and conspiring with curiosity and with want, had not only given a rapid movement to the enterprising spirit of industry, but, by increasing the knowledge, and by correcting the ideas, had effected a mighty revolution, which extensive views and an enlarged experience seldom fail to produce in the narrow sentiments of men, the younger sons of landed gentlemen, without any outlets esteemed suitable to their birth, were wont, from a false pride, to remain in loitering cantonments, quartered about the principal mansion of the family from which they were descended; and almost the only provision which their parents could make for them consisted of little farms. Hence every considerable estate was
commonly

commonly distributed into many small parcels, mostly occupied by persons sprung of its ancient Lord, who, rendered dear by nature, and united by interest, enjoyed among themselves that sweet society which near kinsmen and familiar friends find in a kindly intercourse with each other. Such as got no more than temporary leases of the portions bestowed on them, determined by the same motives which operated on other tenants, would be retained in full subjection by their dependence. But people born, and from their early infancy educated in a better way, can rarely submit to behold their children degraded, more than to be themselves reduced, to a level with that lowly order; which dwelt then amidst meanness and poverty, as well as nastiness and toil. Men of fortune would wish to preserve their sons in a line more suitable to their extraction, than they could hold in the humble station of a farmer of grounds belonging to another. Property would be conferred on them: And as those who got it would be capacitated in their turn to acquire over their immediate dependents that proprietary influence which is its natural concomitant, their native superior was obliged, on this account, to invent modes by which, even after divesting himself, his pristine authority might still be retained both over themselves and over their partisans.

The affection which is created by early familiarity, and by long habit, between those who are related by blood, strengthened as well as inculcated by education and by example, might bind together, for a considerable time, a whole kindred in perfect amity, but, amidst all its warmth, is continually weakened by distance; and haughtiness of temper, or love of independence, not to say interfering interests and insulting treatment, producing great coldnesses, and sometimes bitter enmities, instead of good-will, among
near

near kinsmen, might at last excite them to mutiny and to rebellion. A man, therefore, who, by bestowing lands on his children, was going to create a power which in time might become inimical to his family, would not suffer the continuance of their attachment to depend entirely on a bond so frangible and so evanescent as propinquity of blood, but would use precautions more infallible to restrain both them and their descendants from growing formidable to his successors. Interest, by which a fast hold is obtained of selfish men, and whose operation is permanent, would be employed to ensure their fidelity, and care would be taken that their possessions should never become altogether independent of that chief house which they were designed to support. Either a power of recalling his donation at pleasure would be stipulated by the donor, at making it, to himself and to his heirs; or a partial and conditional, instead of a total and absolute alienation, would be made; and terms, on which the donee was to hold his gift, would be imposed on him at accepting of the estate.

The precariousness of the tenure, under which their property was held by those whose right was redeemable, would of itself bind its owners to their good behaviour. A person, compellable to surrender valuable lands for a trifle, would be circumspect in his conduct.

But natural affection is a stronger principle than an artificial partiality to a favourite created merely by primogeniture; and parents, at adjusting their settlements, at the same time that they bent a studious attention to maintaining a due subordination in the younger branches of their families, and to preserving them closely united to the principal stock from which they had sprung, would
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not leave them continually exposed to be stripped of their patrimonies at every caprice of their elder brother. Rights, not defeasible at his will, would frequently be conferred upon them, and, amidst the independence thence to accrue to them, a great security might still be obtained against their undutiful deportment, even in cases in which a power of redemption was not reserved to the donor.

Tenants, it has been shewn, were bound to follow their landlord to the field, as well as to submit to his courts; and these duties came from custom to be implied in lease. The security, therefore, wanted by fathers at settling appenages on their younger sons, would be obtained with ease by constituting those on whom they were bestowed a species of lessees, or by assimilating alienations to leases; a resemblance, which it is neither a remote thought nor a difficult operation to give them. Bind the possessors to pay rent for their lands, and the relation of landlord and tenant, together with the obligations implied in that relation, should directly be created between them and the person to whom they were bound to pay it. Intended, however, not to be reduced to the level of farmers, but to retain the rank of proprietors, it was necessary that their families should not be removable from their farms, and that their rent should not be liable to augmentation: And, as the length of time which a lease is to last is variable at pleasure, the inconveniencies apprehended from giving them lands would be avoided by declaring their right perpetual. Their successors, as well as themselves, would thereby remain incorporated parts of their native confederacy: Their hereditary connection, cemented by a direct tie, would be perpetuated with it: And, on attaching them in that strong manner, you might look with

by granting lands in perpetuity, under obligations similar to those implied in lease.

with assurance from both, for all the aid and all the submission expected from the other associates. Their enemies, their fears, their interests, their prejudices, would be the same with those of the other renters of the estate; and having never been severed from the band, of which their ancestors had been partisans, and into which themselves would readily pass by succession, they would not only continue united with those who occupied that estate, with whom they would imagine themselves both more naturally and more firmly connected by consanguinity and by intercourse, than with the possessors of any disconnected lands, but would also obey, like other tenants, the commands of their Lord both in war and in peace, or would perform under him, for the common safety, the service accustomed to be done by his other followers, and would, no less than they, be subject to his jurisdiction.

The peculiar kindness entertained for them, and the superior degree in which their posterity, as well as themselves, were meant to be preserved, would both require and cause them to be distinguished with much favour. Either military aid would be all the tribute demandable from them, or the rent, imposed on them in money and in commodities, would be light: No duties, which had not been covenanted in express terms, or which were not indisputably implied in their bargains, could be exacted from them *: They were exclusively entitled to the natural possession of their grounds: And they were not liable to be deprived at the arbitrary will of their benefactors. Their possessions, therefore, would be both more beneficial and more independent than those of common tenants; and, in consequence, their rank would continue, as their birth had made it, and as it had originally been designed to be kept, vastly

* Reg. Maj. iii. 22.

vastly higher. The whole powers implied in dominion would be exercised by them at pleasure over their lands, and they would enjoy a dignity proportioned to the extent and the value of these. Hence they would not only seem to be proprietors; but the property would soon come, by an easy transition, to be formally vested in them after that firm manner, in which a reasonable attention to the security both of the landlord and of the tenant required it to be constituted, or in which lands are at present established in inferior holders, under claims reserved to the original Lords to whom, before these subaltern rights are granted, they belong absolutely in demain.

Hence tenures and vassalage.

My Lord, the learned disquisitions, to which lawyers have descended concerning the precise time at which the feudal law was introduced into Scotland, appear to be little less idle than those minute researches made by antiquaries after the particular region from which this country was peopled. The Romans, in their progress towards the northern parts of Britain, found armies constantly in their front *; a fact incontrovertibly attested by the oldest authors, in whose writings any authentic information is preserved concerning ancient Caledonia †: And a nation, against whose inroads, during the reigns of Titus, of Hadrian, of Antoninus, and of Severus, strong forts, deep fosses, high ramparts, and stupendous walls, were obliged to be stretched from the German Ocean to the Irish Sea, must have been numerous. A doubt, therefore, cannot reasonably be entertained, that men, as well as goats, blackbirds, gold-finches, and sheep, existed north of the Tweed in the days of Alexander the Great: Our legends ascend even higher than Fergus, the contemporary of that conqueror:

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* Caesar.

† Tacitus.—Suetonius.

And those scanty remains, which form, during many centuries, that termed the HISTORY OF SCOTLAND, and which consist of little more than a naked list of its Kings, bear a strong resemblance to the imperfect traditions, which, mingled with fables, and corrupted by them, might be transmitted, in its peculiar circumstances, from age to age, concerning their memorable transactions. As its inhabitants appear to have been early congregated into society, some species of government, however disjointed, must have been established among them. Nevertheless, amidst the obscurity in which the North continued long to be veiled, it would be rash to affirm that fiefs either had been introduced among the Scots in the days of Julius Agricola, or made their appearance there sooner than in other countries of Europe. At the same time, difficulties almost insuperable are apparent in the hypothesis commonly formed on their origin; and a thoughtful inquirer will not easily reconcile himself to believing, either that the feudal system was an invention made deliberately by the northern nations, after they had over-run the Roman empire, for securing an undisturbed enjoyment of the rich provinces conquered by them in the fine climates of the South, or that it was voluntarily imported, on account either of its excellency or of its fitnesses, by any people, all at once, by adoption from some other in which they had met with it. A harmony of design, an aptitude of parts, a consistency of principle, a length of view, are plainly discoverable in it, which could only be a work of time, and to which nothing adequate is found in the character of the Goths. Habit, giving both the mind and the body a natural and a constant tendency towards those movements to which they are familiarised, produces in them a stiffness, which renders our faculties and our limbs unpliant to others, and from the difficulty found in comprehending and in
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using things, greatly dissimilar to those with which we have been accustomed, it is long before our feelings can be fully reconciled to them. New modes are generally disagreeable; and even in the eighteenth century an alteration of any institution, rendered venerable by age, or familiar by custom, enlightened as the world is at present, could scarcely be effected all at once in England or in France, two of the least bigotted and most civilised nations of modern Europe. During the dark ages, improvement itself would have shocked the prejudices of the vulgar, that is, the bulk of mankind, whose only standard, in most articles, is ancient usage; and they would have resisted it to blood. In countries into which the feudal system was not imported by conquerors, it was probably an invention made gradually by the people themselves, rather than a reformation effected at once by their legislatures: And in the foregoing deduction, your Lordship may perhaps have marked causes which might naturally lead a barbarous nation by easy steps to invent it. Feudal grants either were originally little different from perpetual leases, or sprang out of them.

A landlord, who, at disposing in that manner of a part of his estate, was desirous to retain the purchaser and his successors attached to his family, and who on this account stipulated from them performance of duties which might effectually bind them both to his heirs and to himself, had a claim to the rent and to the services promised to him; and this right was perpetual. A constant as well as a strong interest was thereby reserved to him even after the alienation, which in substance amounted not to more than a lease, or differed little from it: And as a man, to be entitled, independently in himself, and inderivatively from any

other, to draw rent for ground, must be owner; it was necessary, in order to bestow a solidity on his right, as well as to afford evidence of his title to demand payment, that the property should remain with him. Hence he retained, after having made a perpetual grant charged with an yearly tribute payable for ever to his family, no less than after making a temporary lease, the character of Lord of the lands *: He was not apparently divested of them: His title seemed not, even after alienating them, to have suffered any diminution: He appeared still to be full proprietor: And the only person, in whose favour his interest was restricted, or who could tell him that it was really lessened, was his proprietary tenant, the alienee. The person to whom the perpetual lease had been granted, having an indefeasible as well as exclusive right to possess the ground, being entitled at pleasure to use every power exerciseable over it, and being bound to pay for his possession no more than the consideration expressed by him, was also owner. No other than his landlord could pretend to any interest in his farm; and even the alienor could neither control him in the management of it, nor demand from him more than those duties which had been promised at entering into the agreement. In every other respect, the unlimited property was vested in him, the alone rightful possessor. But a lease is a title too slender to support a perpetuity: His dominion, therefore, which his security required that he should be enabled constantly to vouch, came to be constituted in a durable form, like to that in which the right of the lessor was established. Both parties were thereby rendered owners, or a property was vested in each. The right of the donee was derived from the donor, and was intended never to become

* Reg. Maj. iii. 22.—Quon. Attach. 24. 25. In ancient books he is termed simply Dominus, without any distinction.

become wholly independent of him ; the former was subjected to perform services, as well as bound to pay rent, to the latter ; these duties were direct proofs, that his possession was held under another : The interest vested in him was thence established on a mixed or compounded title, constituting him proprietor, but declaring his property to be held under his Lord, and binding him to performance of the render stipulated out of it. Behold a feudal right to lands. Accordingly, in England, the same word, which signifies a farmer who rents ground, is still employed to denote a person who holds it of another. Their rights, probably differed at first chiefly in duration, and came only afterwards to be distinguished by the form, or firmness and slenderness, of their constitution. Tenant is an appellation given in ancient statutes to the one as well as to the other in Scotland also * ; but the word FREEHOLDER is more common in our English style.

The amplitude of the interest acquired by one to whom lands were secured in perpetuity at a rent vastly disproportioned to their value, rendering him less necessitous, would cause him also to be less tractable, than a common farmer. The steadiness of the allegiance of a person placed in that condition, it would be evident, could not safely be trusted entirely either to the doubtful recognisance, or to the silent operation, of obligations which were merely implied in his right, or which were supposed to be tacitly undertaken by him. Other means, whose action might supply the want of the restraint imposed by poverty and by expectations, would be substituted in their place to repress any inclination, which natural feelings might occasionally excite in his mind towards

* Reg. Maj. iii. 22.—Parl. 1424, c. 9.—Parl. 1469, c. 44.—Parl. 1474, c. 71.—Parl. 1489, c. 33.—Parl. 1571, c. 5.—Parl. 1587, c. 31. p. 542.—Parl. 1587, c. 64.

wards asserting a perfect independence. Every feudal tenant, at first acceptance of his grant, would be made to take the feudal engagements distinctly on himself: A like declaration would be demanded from each subsequent owner to whom the fief successively devolved: And religion would be called, by intermingling its solemnity, to impress a sanctity on his profession: Forms, ingeniously contrived, by operating on his fancy, both to invigorate his sense, and to enliven his remembrance, of his vows, would lend their assistance towards ensuring performance of them: Limitations would be laid on hostile exercises of his property: And even forfeiture * would be denounced against violations of his faith. Hence humiliating ceremonies, expressive of the extreme sacredness of the engagements contracted by him, of the strict fidelity due from him to his Lord, and of the comparative inferiority of his own rank, were invented to strike his imagination and his heart, and being required to be frequently repeated, as well as performed with much pageantry, obliged him continually both to acknowledge and to remember his subjection and his duty. Every feudatary, at receiving investiture in his fief, made on his bended knees that submissive declaration which came to be termed HOMAGE, and in a reverend posture, with folded hands, swore FEALTY to him under whom his estate was held †. Each proprietor, who afterwards acquired it either by descent or by purchase, was necessitated, before he could be admitted into possession, to apply to the Lord, to whom, on every vacancy, the fief reverted; and at obtaining a renewal of his right, to take on himself the obligations implied in his tenure.

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* Reg. Maj. iv. 11.—Quon. Attach. 18. 19.

† Reg. Maj. ii. 62. 63.—Libri Feud. ii. 5. 6. 7.—Balfour's Practices, p. 38.

A man who held his property under another, having been originally inferior to his Lord, would not soon become insensible to every impression of the low condition in which himself or his family had been found at acquiring it. Amidst any addition derived to his importance from the acquisition, the littleness, in which he would still appear even in his own apprehension to remain, returning continually to his thought, or brought to remembrance by tradition, would considerably check the loftiness of the sentiments formed by him on his elevation; and the duties, obliged to be performed by him, were direct as well as perpetual acknowledgments of inferiority. The insolent name, which marked the masterful authority enjoyed over moveable tenants, was not however assumed by a Lord to distinguish him above his feudatary: Another appellation, more gentle in itself, but expressive still of superiority, denoted their relation. A proprietary tenant, at doing homage to his SUPERIOR, professed himself to be his MAN*, or enlisted among his followers; and at swearing fealty bound himself by oath to be faithful in his service. Hence he pledged himself to the confederacy to which he associated, or became a surety for their safety to all the members of it; and acquired, perhaps on that account, the denomination of vassal†.

It was probably in this way that fiefs came to be invented. Leafes were transformed into them, and the obligations implied in the latter were transferred to the former. The steps, which might gradually lead to the transition, are obvious, and the dangers, dreaded from partial alienations, would be escaped by the invention. Neither would the territories of the Lord, who had alienated

* Homo. Hence homage. Balfour's Practices, p. 38.—Rymer, iv. 537.

† In Italian, VASSALLO; in French, VASSAL: Both diminutives from the Latin, VAS.

alienated his lands, be lessened in extent, nor would his forces be diminished in number : But his influence, or military and judicative power, would rather be fortified by engagements solemnly made to support it ; subordination also would be introduced among his troops ; and inferior officers, attached to his family by consanguinity, would be provided to assist him in conducting his followers to battle.

Their antiquity in Scotland.

Into Italy, and the other countries of Europe which border on the Mediterranean Sea, the feudal system was certainly brought by those savages, who, issuing in herds from the North, overthrew the Empire of Rome, and, expelling its vanquished citizens from the lands which had belonged to them, continued still, in their new settlements, to be governed by their own customs ; the only usages with which they were acquainted, or to which they would submit. But its introduction is not ascribed in Scotland, either by history or even by tradition, to conquest, and reason hardly allows us to suppose that, in every instance, it was constantly derived progressively by communication from one people to another. Among us, its origin must be sought in causes different both from force and from adoption ; and in their primitive condition your Lordship will discover seeds which might naturally give birth to it among the early inhabitants of this country. No doubt, amidst the great variety to which human conceptions, and of course human affairs, are incident, a diversity almost imperceptible in those minute circumstances which strike the first impulse on thought, giving them a particular direction, may produce institutions widely different in nations found in states apparently similar ; and a man, acquainted with the slender evidence on which his conjectures must here be built, will not assert dogmatically

matically, that fiefs did not originally spring up without transplantation in climates extremely distant, perhaps entirely disconnected, from each other. They must unquestionably have been established in some region before making their appearance in any other: But light is wanting to guide us with certainty to that region; and we find vassalage already rooted in several soils, among others in Scotland, as early as any records concerning them ascend. The feudal plan, it has been shewn, in all probability derived its first lineaments from the feebleness of government and the barbarism of its subjects: And the ancient Scots were assuredly in a state sufficiently rude for necessity to generate it among them by degrees. Few people can well be imagined either less disposed, or less capable, than they, to relish or to adopt from others a great and shocking innovation. Not only is the term FIEF found, but the feudal principles can be distinctly traced, in the oldest documents extant concerning the Scottish constitution. Those venerable statutes, which, by a perpetual tradition, the chief proof afforded us of either the age, the author, or the authenticity of any ancient book, have generally been ascribed to Malcolm II. who reigned in Scotland before the accession of William the Conqueror of England, are full of them: And the system itself, if not scientifically, is at least professedly treated in an institute of the Scottish laws, which bears in its preface to have been compiled by order of David I. whose reign began in 1124*. A charter, by which Alexander II. reinvests Allan of Lani, and Margaret of Lani, in the lands of Lani, to be held by themselves and by their heirs, under an obligation of performing the service wont to be rendered for them to the crown, creates a high probability, that tenures had been introduced among us early in the tenth century.

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* Statutes of William the Lion.—Ancient charters, &c.

In the archives of Buchanan of Lani, is still preserved a little silver sword, about two inches and a half in length, the symbol, which Alexander there asserts had been given, at the original granting of those lands to their ancestor Gillespie Moir, by his predecessor, that profligate debauchee, Culen, whose enormities, marked in history, are hardly credible, but whose existence is fully authenticated by that curious relick.

In Scotland, no less than in other countries, the improvements made on tenures must have been gradual. In all likelihood, before arriving at that extreme rigour which is sometimes termed their entire purity, they went through the whole progress naturally required in advancing them to perfection; and those whose estates were extensive, in appanages bestowed on their children, or in sales made to others, had vassals, who held of them in terms strictly feudal, long before all the lands in the kingdom had come to be holden of the crown. It is not easy, on any other supposition, to account either for the restraint or for the forfeiture imposed on the alienation of military fiefs without consent of their superior. His subjects being supposed to be all equally well affected to the King, it must have been a matter perfectly indifferent to the Sovereign, whether one person or another person held an estate under any of the royal vassals; and rich Lords, without very cogent motives, would not voluntarily subject either their property or their power to his caprice: But a private man, to whom grounds belong, who lives in them, and whose safety, as well as importance, depends greatly on his neighbours, is deeply interested in the character and the affection of those who are introduced on his lands: And after a full consideration, the story recorded in the laws of Malcolm will not perhaps appear entirely destitute of probability.

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That Prince having delivered his territories from the desolating rapacity of Grim, and from the dreaded incursions of the Danes, had acquired, in consequence of the splendid success gained by him in war, a mighty authority in his country: Having again consolidated all Scotland under one head, he would naturally be desirous, in order to strengthen the attachment borne to him by his subjects, and to unite his people more firmly among themselves, to introduce an uniformity into the constitution: And it is not at all impossible, that, amidst the excessive fondness commonly discovered, especially in the case of restorations, to new Kings during the first moments after their accession, he might prevail with his nobles, after the feudal mode had already diffused itself pretty extensively over his dominions, to make some alteration in their forms; that those, who hitherto had not held their property under any superior, submitted to hold it in future of the crown; that, on their own death, they put both their fiefs, and their heirs, during their nonage, under the guardianship of their Sovereign; that, for enabling him to support his household in a stile suitable to the ideas entertained about the dignity of royalty, they also subjected their successors to a fine termed RELIEF, payable at obtaining admittance into their inheritance; that, in order to carry their plan into full execution, and to give it perfect stability, they made a formal surrender of their lands into the hands of the King, in favour of themselves, on condition that each estate should be directly restored to its owner; and that the agreement was honourably fulfilled by new grants, bestowed, conformably to the views of both parties, indiscriminately on every one of them: All which such as read with accuracy will discover in that famous statute.

S E C T. III.

Nobility conferred on Lands.

Feudal dignities.

MY LORD, under a feeble government, the progress from great barbarity, through defensive leagues and military associations, to feudal tenures, is very natural; and that native authority, which your Lordship has now beheld arising out of landed property, however different from those honours about which we are inquiring, led directly to the production of them. In Scotland, people of fortune, neither invited into town by the elegance of its entertainments, nor allured to Court by the prospect of interest, were wont mostly to reside at a distance from both, retired, on their demenes*. There the only equals, by whom their habitations were ever approached, were those rare individuals placed in like fortunate circumstances with themselves; and their lands formed the objects towards which, in the comparisons made by envy and by pride between those who pretended to an equality among themselves, their imaginations were principally directed. It was their estate, which both exalted them above their inferiors, and raised them to a level with their equals. Each proprietor, therefore, would endeavour to procure to his property something, which, both in his own conception, and in the opinion of others, should elevate it above that of his neighbours. A better husbandry and a finer culture, those vulgar means that lead to such distinctions only as, depending on plain industry, are placed equally within the

* Buchanan, x. 41.

the reach of every man, little prized in a country which was inhabited by a people exceedingly averse to labour, would be abandoned to those sober, but despised, spirits, whom a just taste of life, an accurate estimation of things, or a happy temperature of mind, prevented from being seduced by the false lustre of deceitful appearances. Roads, more artificial and less obvious, by which near approaches are made to those who had once been superiors, by which others who had originally been equals are left at a distance, by which vanity is more gratified on success, and which few even aspire to attempt, deriving a dazzling brilliancy from the heights and difficulties necessary to be surmounted before their extremity can be reached, would be more admired and more chosen on that account.

Among the Scotch, as a man's importance, and even his safety, or at least his quiet, depended greatly on the multitude and the affection of his followers, ingenious artifices would be contrived to strengthen their attachment and to augment their number. Not only an entire solidity, but large additions, would be endeavoured to be acquired to that ordinary authority which is naturally consequent on proprietary influence; and a higher dominion, by which his subjects might be retained in their duty, would be sought over them. Hence various jurisdictions, rising in gradation above one another, would be invented, and every proprietor would obtain all the amplitude which he could to his own power.

Those jurisdictions, differing in the rights implied in each of them, it was convenient, if not necessary, both to distinguish by proper names, according to their several prerogatives, and to an-

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nex to the lands in whose owners they were meant to be vested. These double purposes could not be accomplished in either an easier or a surer way than by conferring the denomination, invented for each species, on the estate which was proposed to carry to its owner a correspondent jurisdiction, or by erecting the lands into it. The lands and the jurisdictions, being thereby incorporated, would constantly accompany each other: A clear idea of a determinate authority should directly be excited in every person who heard of the appellation which had been affixed to any fief: And a hint was thence suggested, that estates were susceptible of being exalted by distinctions above one another, or that titles might be conferred upon them. The ampler the jurisdiction which was bestowed on any lands, the consequence of the person to whom they belonged would be the greater among those subject to it; and the higher the denomination to which they were raised, their owner, whose dignity reciprocated to his estate, would be proportionably elevated in rank. But there is a height above which proprietary jurisdiction ought not to ascend; and as, at this lofty degree, it might degenerate into a tyranny, dangerous to the state, as well as insupportable by those immediately exposed to its severity, a difficulty would soon be found in attaining to it, and at last it would rarely be granted. An eminence, however, it would still be perceived, might be gained from a distinction not wholly dissimilar, which should be more harmless, and which it is not a remote transition to make.

Territorial
honours.

An estate larger than another, being in itself a grander, as well as in most cases a more valuable object, fills imagination more, and bestowing on its owner greater riches, and of course ampler ability both of real beneficence and of external splendor, seems
naturally

naturally entitled to be raised to higher dignity, than a smaller, which, in itself implying an inferiority, and commanding less attention to him, it would be thought, ought not to retain a denomination equally high. The dignity of lands would be distinguished from the power annexed to them: The former would be increased without extending or even regarding the latter: Different degrees of it would be marked by names peculiar to each; and a superior title would be given to the grander object, or to any estate proposed to be placed in a superior order. Its Lord would thereby be elevated above all whose fiefs were not promoted to a like honour. Each step which property was advanced would flatter the vanity of its proprietor, who found his family, by that simple contrivance, exalted above others which had formerly been equal, and which, perhaps, in other respects, continued still on a level with it. This mode would often be taken in cases in which estates, co-ordinate in jurisdiction, differed in magnitude: And in those in which both had already arrived at the highest point beyond which sound policy or constant usage suffered not patrimonial authority to be stretched, another method could scarcely be employed to gratify their rivalry.

My Lord, profound theories, which pretend to trace *a priori* matters of fact, or real existence in human affairs, from the mechanical effects which objects are supposed to be naturally fitted to produce on the imagination, founded in such nice views of things as can only be formed by abstruse metaphysicians after deep study, may be grateful to a few refined spirits, who can enter with ease into abstract speculations, and who can relish their sublimity; but are also extremely apt to lead into egregious errors, nay, into despicable puerilities, unless good sense and great accuracy

racy incessantly restrain them in their progress ; and David Hume is perhaps the only Scotchman who has ever attempted that philosophical method with any success * : Yet, even his ingenious disquisitions, rendered, by their subtilty, incomprehensible and painful to coarse and vulgar understandings, have been triumphantly made a vain sport to the presumptuous and the ignorant. Conclusions built on those common principles, by which mankind are experienced to be actually influenced in their conduct, and whose solidity is continually proved by appeals made to real life, bid much fairer to be just. A man, therefore, who would arrive at truth in any complex question of ancient jurisprudence, instead of directing his attention to any visionary state assigned to his species by his own fancy, ought, amidst the extensive views taken by him, to keep his eye steadily fixed on the particular nation about whose antiquities he is inquiring, and, at every instant, to reflect with sobriety on the way in which, according to the usual practice of common sense, a people placed in their circumstances should think and act, in consequence of the immediate necessities under which they laboured, and of the passions directly inspired by the objects with which they were surrounded. In this way, conclusions, consonant to reason, can alone be discovered. Possibly the account which I have given, different as it is from that commonly delivered concerning the origin of fiefs and of honours in Scotland, may nevertheless be found, on an acute examination, agreeable to those natural sentiments, which, it must be owned, possess a mighty, however imperceptible, influence in leading men to all their establishments : But a system, contradictory to fact, must also be destitute of a foundation in truth, and, of consequence, can never be valuable. Hence, in making my deduction,

* Treatise of Human Nature, V. 3. b. 3. p. 2. f. 3. 10.

deduction, I have not ventured either to launch into, or to proceed on, any general prospects of those which, in the fashionable language of late years, have sometimes been termed the early periods of society, but, during my progress, have kept constantly in sight the peculiar condition in which the ancient Scots were really found; and my theory is in that way, the only way in which I could expect it to be, confirmable, perhaps, by facts, and provable from record.

The oldest fiefs in Scotland, and, indeed, all over Europe, it is universally agreed, were military fees. Martial tenures were long termed, as well as alone esteemed, proper or right tenures: All others were deemed improper and degenerate. Lands, not proved to be holden on different terms, were presumed to be held in that manner. Military service constituted the ordinary duty which vassals were bound to render to their lords: SERVICES USED AND WONT, is the technical expression employed in formal deeds, to signify those performed in war*: And the command in arms, held by proprietors of estates over those belonging to their clans, is intimated in the common appellations, which were long borne, and perhaps are still retained, by some families. Among the commissioners nominated for levying a supply granted to the crown in 1690, your Lordship will find THE CAPTAIN OF CARRICK, THE CAPTAIN OF CRAIGNEISH, and THE CAPTAIN OF DUNNOON; descriptions given of them even in an act of parliament†. CAPTAIN OF CLANRANAED is the addition employed for distinguishing

F

guishing

* Sir George Mackenzie's Institutions, B. 2. t. 4.—Stair, B. 2. t. 3. § 5. 6. 31.—Macdowal, B. 2. t. 3. § 3. 9. 51.—Erskine, B. 2. t. 4. § 2.—Craig, L. 1. d. 10. § 27.—L. 2. d. 17. § 33.

† Parl. 1690, c. 6.—Compare Parl. 1689, c. 32. Parl. 1704, c. 4.

guishing Ranald Macdonald in a British statute attainting him of high treason *.

A jurisdiction, as well as an influence, was, and still is, annexed to property: The former, as well as the latter, being vested in the owner, extended to all who lived in his grounds: And proprietary authority reaches to lands reserved in superiority only, no less than to those possessed in full property. It was raised, also, to different heights, as well as distinguished by different names; Baronies, Regalities, Justiciaries; into which lands, intended to convey the power respectively imported in each denomination, were elevated †.

In ancient times, jurisdiction was administered by judges, who were assisted and controlled by inquests, consisting, in inferior partimonial courts, of boors dwelling in the estate, and in superior or general courts, of jurors taken from the vicinage ‡.

The portions, too, bestowed on younger children, often consisted of small pieces of ground termed WADSETS, to which rights, redeemable at pleasure, were conferred on them. Like grants were made to favourites.

Not

* 1707 George I. c. 12.

† Stair, B. 2. t. 3. § 62. 63.—Macdowal, B. 2. t. 3. § 83. 90. 95. 96. 97. 100. B. 4. t. 14. § 1. 2. 7.—Erskine, B. 1. t. 2. § 11. 25. 26. 27.

‡ Craig, L. 1. d. 10. § 3. L. 2. d. 2. § 24. L. 2. d. 17. § 28. L. 3. d. 7. § 2. 7. 11. &c.—Stair, B. 2. t. 3. § 3.—Macdowal, B. 4. t. 33. § 2.—Hence those termed BOORLAW courts.

Not jurisdictions only; honours also, were incorporated with lands: Fiefs are divided on that account into noble and ignoble: And those, annexed to them, often differed widely in degree. My Lord, it was common in Scotland, for the conveniency of the landholders, to unite into one tenement estates, consisting of things legally susceptible of union, which either were different in kind, such as lands, tithes, patronages, fisheries, mills, and the like, or were not contiguous. Estates, more favoured than the former, were erected into dignities. A dignity, termed a Thanedom, seems to have been extremely ancient in the North; and Cawdor, of which Macbeth became Thane, still retains the generic appellation possessed by it in the remote reign of Duncan *. But that which came to be most commonly granted, is denominated a Barony; a pre-eminence, which, beside the advantages implied in union, brought to its owner a high criminal as well as civil jurisdiction. Lordships, Earldoms, Marquisates, Dukedoms, are superior denominations, which rise in gradation above one another; and lands, intended to be peculiarly exalted, were raised to them †.

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S E C T.

* Macbeth, Act 1. sc. 4.—Buchanan, vi. 52.

† Craig, L. 2. d. 7. § 17. 18.—Stair, B. 2. t. 3. § 44. 45. 62.—Macdowal, B. 2. t. 3. § 88. 89. 95.—Erskine, B. 2. t. 3. § 45. 46. See also B. 1. t. 4. § 25. 26. &c. B. 2. t. 6. § 18. &c.

S E C T. IV.

In Scotland Territorial Honours were not Proprietary Jurisdictions.

THE erecting of lands into regalities, or even into justiciaries, the highest territorial jurisdictions common in the ancient practice of Scotland, united not the persons invested with them to any peculiar order, and did not imply nobility: They might be bestowed on ignoble, such as naked freeholds, no less than on noble fiefs; and had not a particular title annexed even by courtesy to each of them; but denoted magistracy, and conferred authority only *. The erections, alone productive of that effect, were Earldoms, Marquifates, Dukedoms, and Lordships.

Lands were not erected into Lordships, Earldoms, Marquifates, and Dukedoms, either to bestow on their owners inellective seats in parliament,

The account already given of the late period, at which representation was introduced into the constitution of the Scottish parliament, is abundantly sufficient to prove, that honours, superior to Baronies, could not be conferred, or that the intention of erecting lands into Lordships, Earldoms, Marquifates, and Dukedoms, could not be to bestow hereditary seats in that assembly. The proprietors of the freeholds, raised to these dignities, were possessed of this privilege before their elevation; and a right which accompanied their property, and which was already enjoyed by them, could neither be given, nor be intended to be given, by the King.

Another

* Macdowal, B. 2. t. 3. § 100. B. 4. t. 15. § 7.

Another proposition seems equally certain, that these erections were not made in order to bestow on the owners of the lands any peculiar, or high and extraordinary, jurisdiction. It is indeed asserted by some writers *, that Earls, if not other peers, at their original institution, were officers set over provinces, termed Counties or Shires, which were subjected to their authority, and that sheriffs were deputies, who came, in process of time, to be employed to perform the duties of the office in place of the principals to whom they were substituted; an observation which is perhaps applicable to England: But we seem not to have any solid ground either from statute, from history, or from record, to suppose that it ever applied to Scotland. Earldoms are objects entirely different from counties: The terms do not reciprocate.

or to vest in them any extraordinary jurisdiction,

Many counties which still subsist; the shires of Air, of Bamff, of Clackmannan, of Edinburgh, of Inverness, of Kinross, of Kirkcudbright, of Nairn, of Renfrew; appear never to have had Earls who were connected with them, or who took titles from them. I might add Aberdeen, Bute, Cromarty, Dumfries, Elgin, Forfar, Haddington, Kincardine, Lanark, Linlithgow, Lothian, Perth, Roxburgh, Selkirk, Stirling, and Tweeddale, from which styles were indeed taken, but only in times extremely modern, and long after these districts had been established into distinct shires, each subject to its proper sheriff: The honours, too, conferred on the noblemen who bore them, were merely personal; and their titles seem not all to have been derived from counties, but were sometimes brought from boroughs or other places lying in them.

The

* Essays concerning British Antiquities; essay Honour, DIGNITY.

The earldoms of Angus, of Argyle, of Caithness, of Fife, of Lennox, of Moray, of Orkney, of Ross, of Sutherland, of Wigton, included not the whole lands contained in the counties which carry their names. I believe that no earldoms, or hardly any, did. Large estates, locally situated in these shires, were not even held in vassalage of the noblemen who got titles from them.

Many Earldoms formed no more than small parts of counties, and were composed of various parcels of lands, dispersed in different shires, and at great distances from each other. Those of Caithness, of Sutherland, and of Ross, continued long to be parts of the shire, and subject to the sheriff, of Inverness *. The former seems not to have been dislevered from Invernessshire till after the year 1617†: It was only in 1633, or at soonest in 1601, that Sutherland was erected into a county ‡: And Ross, after a sheriff had been ordered by parliament, in 1503, to be appointed over that district, was not finally established into a shire by itself before the year 1661, or rather 1649 ||. The Earldom of Marre

* Parl. 1503, c. 93. 95. — See parl. 1503, c. 108. 128. — parl. 1509, c. 137. — parl. 1587, c. 46. 82.

† Precept dated in 1524, and charter dated in 1589, printed among the papers exhibited to the court of session in 1772, in a cause, Henderson of Stemster v. Sinclair of Ulbster and Sinclair of Southdun.—Parl. 1617, c. 16.—Parl. 1641, c. 18. (and c. 264. not printed).—Parl 1644, c. 9. 25.

‡ 32d act (not printed) of Parl. 1633.—Parl. 1641, c. 19.—Charters of the Earldom of Sutherland, dated in 1455, in 1525, in 1546, and in 1580, published in an Appendix to the Case of the Countess of Sutherland.—Charter dated 29th April 1601, cited in Appendix to the Case of Sir Robert Gordon.

|| Parl. 1503, c. 61.—Parl. 1617, c. 16.—Parl. 15th March 1649 (not printed).—Parl. 1661, c. 14.—Act (not printed) of Parl. 1661.

Marre*, and the Earldom of Buchan†, very ancient dignities, still lie in Aberdeenshire, and seem always to have lain in it. Athole and Menteith are both situated in the county of Perth. Carrick lies in Ayrshire.

It is not pretended that, in Scotland, Lords, Viscounts, Marquisses, or Dukes, ever were magistrates appointed over territories assigned to them. This idea is confined to Earls: Yet the jurisdiction belonging to the first four orders is in every respect co-ordinate to that enjoyed by the last; a proof, that among us the notion has probably originated in a grammatical conceit, derived from the etymological analogy remarked between the Latin words ‡, commonly employed in translation for Earldom and shire, which seem to imply that the latter had been substituted in place of the former.

Sheriffs appear not to have ever been named by Earls, but were nominated, either mediately or immediately, by the King. Even those who held the office by inheritance in property derived their right originally from the crown; and the deputies, appointed by the nobility to exercise their jurisdiction over their fiefs, were not distinguished by any appellation different from Bailli ||, that commonly given to their substitutes by other proprietors of lands.

The

* Charter of the Earldom of Marre, dated in 1561, printed in Appendix XXIII. to Brief of Sir Robert Gordon.

† Charters of the Earldom of Buchan, dated in 1477, printed in Appen. Brief, 20.

‡ Comitatus and Vice-comitatus.

|| Parl. 1581, c. 28.

The term VICE-COMITATUS, which in both nations is used for shire, and in consequence the existence of those districts termed Counties, or the division of the kingdom into them, appear to be as old as any authentic records or genuine history concerning the state and constitution of Scotland, or as COMITATUS themselves *: And it is both vain to push inquiries, and presumptuous to carry dogmatism, into regions or into periods, involved in darkness, in which certainty and truth cannot be reached. In the most ancient monuments, in which the orders of the state are enumerated, sheriffs are numbered among the ordinary officers of justice; the Justiciary, the Coroner, the Provosts, and the Baillis of boroughs †: A light, in which those properly understood by the Latin Comites seem not to be viewed. Earls are there accounted no more than proprietors of lands, and are classed with Barons ‡.

Neither an Earl, nor any other owner of fiefs ennobled in this country, did thereby acquire or ever possess power over any lands, except those which belonged to himself either in property or in superiority; and it is certain, that they enjoyed not, in consequence of any dignity or honour reckoned superior, an ampler jurisdiction than that implied in a barony: A circumstance which seems perfectly decisive. A Dukedom conferred not a higher jurisdiction than a Marquisate, an Earldom, or a Lordship: A Marquisate did not imply a higher jurisdiction than an Earldom or a Lordship: A Lordship was not inferior in this respect to an Earldom: And

* Stat. Malc. II. c. 7. 8. &c.—Reg. Maj. i. c. 9. § 6.

† Stat. Malc. II. c. 7. 8.

‡ Stat. Malc. II. c. 10.—Reg. Maj. i. c. 4. § 1.

And the power implied indiscriminately in every one of them was neither more nor less extensive than that ordinary authority implied in a simple barony *. Higher, as well as different jurisdictions, rights of justiciary, rights of regality, rights of bailliwick, are well known ; but, in cases in which they were intended to be bestowed, the particular species meant to be conferred was expressly granted, or the lands were incorporated into the denomination correspondent to it.

An Earl possessed not even the power of shrievalty within his Earldom. In ancient times, an appeal lay from the judgement of the proprietor to the court of the sheriff ; from the Comes, therefore, to the Vice-Comes, that magistrate who is affirmed to have been his deputy †. Hence Dukedoms and Earldoms, as well as Lordships and Baronies, were often erected into regalities ; a denomination which conveyed to their owners the power of sheriffal-

G

ty

* ‘ The erection of lands into a Dukedom, Marquisate, or Earldom, did not extend the jurisdiction and privileges beyond those of a barony.’ Macdowal, B. 2. t. 3. § 95.

‘ No other feudal privileges, higher than those of a Barony, are included in the erection of lands into an Earldom or a Lordship, &c. ; for these last are only titles of greater dignity conferred upon a Barony ; but all have precisely the same feudal effects.’ — ‘ The erection of lands into an Earldom or Lordship imports no higher jurisdiction than Barony.’ Erskine, B. 2. t. 3. § 45.—B. 1. t. 4. § 10.

Lord Stair, after observing that lands were sometimes erected into Lordships, Earldoms, &c. adds, ‘ All which are but more noble titles of a Barony, having the like feudal effects.’ B. 2. t. 3. § 45.

See Forbes’s Decisions, 9th July 1713, Duke of Montrose v. Macaulay of Ardincaple. — Stat. Malc. II. c. 10. 14. § 3. 4. 5. — Reg. Maj. i. c. 1. § 4. — iii. c. 1. § 7. — iv. c. 1.

† Reg. Maj. i. c. 5. — iii. c. 22.

ty in civil matters *. The estate belonging to the family of Sutherland, which had been a Comitatus ages before the year 1347, was then erected into a regality by David II. †. The Earldom of Wigton was raised to a like jurisdiction in 1342 ‡.

S E C T. V.

Their only effects were to bring to their feudal owners rank and titles.

but merely
to raise them
in rank.

FIEFS were not ennobled in order to bestow on their owners either inelective seats in parliament, or any jurisdiction higher than ordinary; and inanimate substances, on which nobility is conferred, cannot derive any pleasure from their exaltation. But men, on surveying their elevated property, and on transferring their thoughts from it to themselves, feel an increased satisfaction from their connection with it. On comparing their own with any neighbouring estate, they remark, with complacency, that others seem abased by its elevation; and, in the respect with which they find themselves regarded, perceive with delight the effects produced on the minds of those who institute a like comparison. The honorary appellations, therefore, which were conferred on lands, must have

* Stair, B. 2. t. 3. § 2. 62. 63. — Macdowal, B. 2. t. 3. § 83. 90. 95. 96. 97. 100: B. 4. t. 14. § 1. 2. 7. — Erskine, B. 1. t. 2. § 11. t. 4. § 2. 7. 8. 25. 26. 27.

† Suth. Appen. No 2.

‡ Crawford's Peerage, title, WIGTON.

have been intended to reflect a lustre on their Lords : And, from the manner in which these honours operated, it will appear to have been by reflection alone that they made any addition to the dignity of the favourites to whom the noble grounds belonged.

A man to whom lands, erected into an Earldom, pertained, was proprietor of an estate distinguished by that name : The owner of a fief, raised to a Dukedom, enjoyed an estate denominated a Dukedom : In that discriminating circumstance consisted the whole honour belonging to each : And, inconsiderable as the distinction may seem to be, advantages, which are not yet despised, were reaped from it.

Estates, which had already been formed into Baronies, were often erected into Earldoms, and Earldoms were frequently advanced to Dukedoms. But Lordships, Earldoms, Marquises, and Dukedoms, differ only in name, both from Baronies and from each other. The same privileges, judicial and feudal, are alike implied in them all ; and an extension of power, or an enlargement of right, could not be derived from any of them. Something, however, in itself different, must have belonged to each species ; and the denomination, by which alone they are distinguished among themselves, is the only thing in which that difference could possibly consist. The different appellations, therefore, assigned to fiefs, must have been arranged in distinct orders, which rose in regular gradation above one another ; and a peculiar rank must have been annexed to each.

In all cases in which another rule is not established by custom, or obstructs not natural principles in their operation, a preceden-

cy, corresponding to the dignity of an estate, is commonly allowed to its proprietor. The degree conferred on it, forming a part of the complex perception, excited in all who behold its owner, and who reflect on his connection with it, passes by an easy transition to himself; and his rank, as soon as a determinate place had been assigned to each of the various denominations of property, would be regulated by it. A person, to whom an Earldom belonged, would be superior to a person who had no more than a Lordship, because his estate enjoyed an appellation admitted to be higher: One, whose lands were incorporated into a Marquisate, was superior to both: A man, who owned a fief elevated into a Dukedom, was exalted above all the three: And their different ranks would probably be influenced, at their first assignment, by the greater value, or larger extent, commonly possessed by those estates which were raised to each denomination, or rather would be originally adjusted with more facility on account of it. Craig affirms*, that, among our forefathers, such as possessed three castles were alone deemed Barons; an assertion, for which he cites not any authority. A similar rule is said by Perezius† to have been followed at ennobling ground in France and in Germany. Perfect regularity, however, can hardly be supposed here to have ever obtained in Scotland. Among us probably it was always in the power of the Sovereign to confer on any parcel of lands, small as well as great, ignoble as well as noble, any degree agreeable to his Royal inclination. But all Princes, even the most absolute, find themselves under a necessity to keep some measures in distributing their favours, which should otherwise lose much of their

* De feudis, L. 3. d. 7. § 9.—Pet. of the Earl of Sutherland, p. 135.

† L. 12. Cod. t. 1. De dignitatibus.

their estimation : And it should have considerably lessened the honour done to their eminent property, in the eyes of the mighty noblemen to whom it belonged, to behold an equal dignity bestowed capriciously on any diminutive estate. A decency, therefore, was obliged to be observed in nobilitating lands; and estates erected into higher denominations were generally both more valuable, and more extensive, than naked freeholds, or even than plain Baronies. On that discriminating circumstance their respective precedence might possibly be founded at first settling it; and having been once fixed, it would be constantly allowed, as well as easily distinguished, afterwards. An owner of lands united into a Barony acquired at first a higher rank, and came to be of more consequence, than a mere freeholder, not only because his jurisdiction was ampler, but also because his estate was generally larger, and he was united to an order deemed superior on that account. In like manner, one whose property was erected into a Lordship ranked before a simple Baron, because he was possessed of an estate which gave him dominion over more dependents and a wider territory. Even among persons equal in degree, difference of fortune, a splendid object, whose image, mingling itself in the fancy into the compound idea of its possessor, modifies every view taken of him, is often felt to cast the balance in the article of respect.

The foregoing principles account also for the origin of that gradation in which noblemen rose above and descended below each other, or for the rank held by them among themselves, as well as above commoners. It might often happen that two or more Lordships met, either by descent or by purchase, in one person, or that one person was proprietor both of a Lordship and of

a Barony, or perhaps that he owned a Lordship and some other estate. These estates, on account of their rare magnitude, were incorporated into one great tenement, for distinction termed an Earldom, which came thence to be deemed a higher denomination; and his estate, being more valuable, or perhaps comprehending more than one Lordship, naturally gave its owner a superior rank to a Lord, as well as to a Baron, as it included a superior or overplus estate, together with one of the inferior denomination.

The titles of Duke, Marquis, Earl, and Lord, were no more than terms reciprocating to Duke-dom, Marquisate, Earldom, and Lordship; to which they were appendants; denoting owners of fiefs dignified with these denominations, on whom they were accordingly bestowed.

Not precedence only; titles also, flowed from nobility conferred on lands. Their denomination indeed passed, perhaps more easily than their degree, to their owners, as it is more natural to mark things which are immoveable by generic appellations expressive of their peculiar qualities, than to conceive them holding a rank, or changing it; and the one would on that account be transferred from them with more facility than the other. The owners of Lordships, of Earldoms, of Marquisates, and of Duke-doms, possessing fiefs differing from each other, as well as from Baronies, in name, and taking place according to the order of these, it was both convenient and natural to distinguish by terms proper to each. The titles assumed by them were possessive nouns, derived, according to the analogy of language, from those bestowed on their lands, and reciprocating to them; and imported no more, than that the persons who bore them were proprietors of estates which had obtained dignities of the same appellation.

In this way fiefs advanced to honours conveyed to their owners great rank and high titles; the only superiority which could here be acquired: And it is certain that both were actually

tually derived in that reflex manner from them. In Scotland Nobility was conferred either, first, by patents specially bestowing particular titles and a correspondent dignity on persons intended to be ennobled; or, secondly, by a ceremonious investiture performed in parliament itself; or, thirdly, by the erecting of lands into earldoms, or into other denominations esteemed noble. Patents were either not known, or little used, in that country, till the reign of James VI. The form of creating Lords in parliament probably was not introduced before James I. after a long captivity, had returned from England into his own dominions: And lawyers, as well as antiquaries, are generally agreed that the last mode is the most ancient of all the three in which titles of honours were acquirable there*. In Scotland honours and a title were implied in a certain species of property: The estate of a person, intended to be advanced to the degree of an Earl, was raised by the Sovereign to an earldom: The nobility, implied in this dignity, passed to the proprietor of the estate: Its owner was commonly denominated an Earl†: That title, and all the honour pertaining to it, were universally allowed to him: And it is easy to perceive how they would naturally follow on the erection of lands into denominations corresponding to them.

A person, to whom a barony belonged, was termed a Baron, as the word FREEHOLDER reciprocates to FREEHOLD. This title,
if

* Acts of sederunt 1740.—Sir George Mackenzie of Precedency, ch. 8.—Memorial for Simon Lord Fraser of Lovat.—His information and other papers in the suit concerning that peerage.—Papers in the competition about the Peerage of Sutherland.—Nisbet's heraldry, v. 2. p. 4. ch. 8.

† Craig, L. 1. d. 12. § 23. 25: d. 10. § 16: L. 3. d. 7. § 9.—Macdowal, B. 2. t. 3. § 83. 84.—B. 1. t. 2. § 30.—Essay, HONOUR, DIGNITY.

if it may be called a title, was not however conferred on him by the Crown, either in the charter by which his lands were incorporated into that dignity, or by any separate deed expressly creating him a Baron, assigning him a place for his style, and ordering him to be distinguished by it ; but was spontaneously bestowed by the people, merely because he was proprietor of a piece of ground erected into a Barony *. Among the commissioners named by parliament for levying a supply granted to the Crown in 1690, you may observe Baron Mackcorquodale ; the only person indeed whom I have found described in a statute after that manner †. It is not many years since the death of Mr Graeme, to whom the Barony of Bucklyvie belonged ; and who, on that account, was often styled Baron of Bucklyvie : A gentleman, very universally known by the name of Baron Reid, is still alive : And the commoners, entitled to vote in electing a member to serve in parliament for any shire, are always described, in the books in which they are ordained by law to be enrolled, the barons and freeholders of that county.

This observation is equally applicable to other titles. It would be tedious to go over them all. The first Dukes created in Scotland were a son and a brother of Robert III. This Prince created David, his eldest son, Duke of Rothesay ; a dignity still retained by the heir apparent of the British Crown : His brother, Robert, was made by him Duke of Albany ‡. That honour, Buchanan remarks,

* P. 6. 43. above.

† Parl. 1690, c. 6. The person, intended under that description, probably was Duncan Mackcorquodale of Phantlands, parl. 1704, c. 4.

‡ Fordun, XV. 4.—Boet. l. 16.—Major, VI. 7.—Buchanan, X. 4.—Rymer, VIII. 35. 45. 54. 57. &c. 65. 69. 332.

marks, had never proved fortunate to any elevated to it. He and Boece and Fordun relate, in an affecting story, distinguished by circumstances * uncommonly mournful, that the Duke of Rothesay was starved at Falkland to death †: The heir of Albany died at Stirling by the hands of the executioner: And three or four other persons had been exalted to the same degree before the deposition of Mary. The only Marquis, whom I can discover before Hamilton and Huntly were promoted to that rank ‡, is James, second son of James III. who was created by his father Marquis of Ormond ||. The first person raised to the dignity of Viscount, appears to have been Thomas Erskine, a favourite of James VI. who, having performed a principal part in the mysterious tragedy which was acted at Perth in the year 1600, and having slaughtered, with his own hand, Alexander Ruthven, brother of the innocent Earl of Gowrie, was, in 1606, made Viscount of Fentoun. Lords were probably first ennobled in parliament during the reign of James I.: And the title of Earl is unquestionably the most ancient of all those used at present in the nation §. To avoid repetition, therefore, in explaining my argument, I shall apply it to this title only.

H

Estates

* Similar, but more pathetic even than those, to which, in marking the cruel fate of a contemporary monarch, Gray alludes in his incomparable Ode. See the Bard, II. 3.

† Fordun, XV. 12.—Boet. XVI.—Buchanan, X. 10. Hawthornden, p. 22. 46.—Hume, ch. 18.

‡ Anderson's Collections, preface, p. 41.

|| Ad. case of the Countess of Sutherland, ch. 4. p. 57.

§ Sir James Dalrymple's Collections, p. 146.—See note (B.) at the end of the volume.

Estates more favoured and perhaps larger than baronies, or perhaps several baronies, were united into one tenement termed an Earldom *; and the person, connected with it in the relation of owner, was thence styled Earl, because he was the comes, an expression by which no more was meant than the owner of an Earldom. In this original sense the word is understood in many ancient charters †.

At present a title and a style are always assigned to persons ennobled in the royal writs elevating them to that state, but were seldom specified in old times; and a clause, either particularizing those by which the patentees should in future be distinguished, or authorising the noble grantees to assume them, was much oftener omitted than inserted, at least till James V.'s accession in 1513; a proof, that a title and a style were implied in a particular species of property.

In a great number of ancient charters, in which Earldoms or comitatus are granted by the Crown, not a syllable is found concerning the honours; yet they carried the dignities, as well as the lands, to the persons in whose favour those deeds were made. The Earldom or comitatus not only is the sole thing expressed in them, but the lands of which it consisted are particularly specified in the grants, and it, as well as they, are described to have corporeal boundaries and a local situation; evidence, that lands are alone intended both by the Latin COMITATUS and by the English EARL-
DOM.

* Or Comitatus.

† See note (C.) at the end of the volume.

DOM*. This is their proper technical meaning, and in this sense both words shall generally be used in the sequel. A Peerage, an incorporeal right, cannot be bounded by marches, or situated in a county: But an empty title might, surely, much more easily than a high jurisdiction, be an appurtenant of a noble fief, which had been exalted to a correspondent appellation.

Robert I. the brave Prince, whose name is still remembered in Scotland with exultation, on account of a splendid victory gained by him at Bannocburn, over an English army commanded by Edward II. was powerfully assisted in maintaining possession of the Scottish crown by his sister's son, Thomas Randolph, an excellent governor, as well as celebrated warrior, of this kingdom. In 1312, that King executed a charter, by which he erected a vast territory, the lands belonging to him in Moray, into an Earldom, and made them over in favour of his nephew †. The ex-

Moray.

H 2

pressions

* Charter of the Earldom of Ross granted by David II. in 1371, printed in Suth. appen.—Charter of the Earldom of Sutherland granted in 1455, by James II. also printed there: Totum et integrum comitatum de Sutherland, cum pertinentiis, jacentem infra vice-comitatum nostrum de Inverness—tenendum et habendum dicto Joanni Sutherland filio et heredibus suis, de nobis et successoribus nostris, in feodo et hereditate in perpetuum, per omnes rectas metas suas antiquas et divisas, prout jacet in longitudine et latitudine, cum tenandiis, &c.

† That charter has often been published. See cartulary of Murray, p. 91.—Essay, HONOUR, DIGNITY.—Appen. brief, IX.

Stronger and livelier impressions are always produced by particular objects than by general expressions or even ideas. The conviction of the genuineness of the facts asserted in the text, the force of the arguments brought in it, and the evidence of the conclusions deduced from them, I am sensible, would have been rendered much greater, by subjoining,

preffions used there shew, first, That Randolph had not been an Earl before the deed was granted ; for in the beginning of it he is named Thomas Randolph, Knight, without any addition : Secondly, That he was not thereby created an Earl ; for the charter contains no words conferring either title or dignity upon him : Thirdly, That the lands granted to Randolph had not formerly belonged to him ; for they are described by the King, OUR LANDS IN MORAY : Fourthly, That they are united into an Earldom, together with all the privileges pertaining to it : After which, it is remarkable, fifthly, That even in the grant itself he is incidentally

subjoining, all along, during my progress, the passages of the books, and the words of the deeds, to which I refer, than they can be without them. But the increased bulk, to which my work should have swelled from the inserting of these quotations, obliged me to deprive both myself and others of that advantage.

It is not improper also to take notice, that I have not had access to several charters and other deeds which are cited by me. All the acquaintance I can pretend to have with their contents, has been derived from printed copies or printed extracts. The facts, however, which I give on their authority, I hope will be found pretty exact. An immense collection, both of instances and of writings, relative to Scottish Peerages, has been made in some interesting suits concerning them ; and is especially preserved in the papers that were put into the Court of Session in an action which was brought in Scotland about 1730, between Simon Lord Lovat and Hugh Mackenzie of Fraserdale, concerning the dignity of Lord Fraser of Lovat, and in those exhibited to the House of Lords, in a contest maintained about 1766—1771, between Lady Elizabeth Sutherland and Sir Robert Gordon, concerning the Earldom of Sutherland ; the grand repositories from which much knowledge is derivable on this subject, and to which frequent appeals are made by me, as the instruments, as well as examples, produced in them, were very accurately examined by the gentlemen engaged in those great causes. Hence one may rely with much assurance on facts, which, on a full examination, appear to be vouched by them : And in citing those cases, I mean the proofs quoted in them, much more than the cases themselves.

ally entitled Comes. This charter is the only right which Randolph had to the dignity of Earl of Moray; a title, under which, from his martial achievements, as well as from his domestic administration, he is well known both in the Scottish and in the English history, and which was transmitted by him to his posterity*.

Marjory Stewart, eldest daughter of Robert the Steward of Scotland by his beloved wife Elizabeth Mure, bestowed herself in marriage, Boece says, with a precipitation hurtful to her reputation, on John Dunbar, a second son of the Earl of March. Nevertheless that Prince, after he ascended the throne, to which his claim had been warmly supported by the family of Dunbar, granted to them, and to their issue, the Earldom or estate of Moray, which had then reverted to the Crown. In consequence, John Dunbar was styled Earl of Moray. In Fordun, in Boece, in Major, in Buchanan, in all our history, that title is given him; and under it his behaviour at the battle of Otterburn is not less celebrated than the death of Douglas, or the bravery of Percy †.

The Earldom of Caithness, which belonged to Walter Stewart, Earl of it, and which, for his accession to the barbarous murder of his royal nephew, had been forfeited to the Crown, was conferred by James II. on George Crichton, Admiral of Scotland,

Caithness.

a.

* Fordun, XII. 19. 24. 26. 37. XIII. 12. 18. 22. 23. 24. &c. — Pitfcottie, p. 47. — Rymer, III. 582. 924. 926. 1017. 1022. 1025. 1030. IV. 670. 682. 700. 761.

† Fordun, XIV. 36. 53. 54. — Boet. XVI. — Major, V. 24. VI. 3. — Buchanan, IX. 59. 61. — Record of Charters, B. 1. No 309. — Ad. Case, ch. 4. — Pitfcottie, p. 48. — Rymer, VII. 338.

a son of an eminent Chancellor of that kingdom. George Crichton, to whom the noble fief pertained, became Earl of Caithness*.

Moray.
Jan. 30.
1561-2.

In 1562, Queen Mary granted the Earldom of Moray to her brother Lord James Stewart, Prior of St Andrews. It is not improbable that the title of Earl of Moray was directly given him in the world by those who approached his person; but is scarcely to be expected that any written document which proves the fact can be produced, or even exist, as in another charter, by which the Queen, only eight days after the former, conveyed to him the Earldom of Marre also, her pleasure was signified, that he should carry the style of Marre; which was accordingly borne by James, till this Earldom was surrendered by him to the Crown. The Prior was no sooner divested of the estate, than, relinquishing the title of Marre, he assumed that of Earl of Moray, to which his pretensions depended entirely on the deeds † that granted the lands to him. He is that Murray, the virtuous Regent, who bore so memorable a part in all the important transactions of those days ‡.

Feb. 7.
1561-2.

Rofs.

Henry Stewart, the young Lord, who, amidst a warm competition of powerful rivals, had the rare felicity of winning the affection

* Record of Charters, B. 4. No 290. — Pittcottie, p. 93. 105. — Hawthornden, p. 95.

† Charter, 30th Jan. 1561-2, and Charter, 7th Feb. 1561-2. — Parl. 1563, c. 1. 24. — Charter, 22d Jan. 1563, and Charter, June 1566. — Records of Parl. 1567, and of Parl. 1592.

‡ Ad. Cafe, ch. 6. p. 100. — Appen. Brief, XXIII. — Buchanan, XVI. 26. XIX. 54. — Keith, p. 215. 216. 222. 224. 226. 520. 525. &c. — Parl. 1563, c. 1. 24. Parl. 1566.

fection of the most beautiful and most accomplished Princess of her age, obtained from Queen Mary, during her fond moments *, before the celebration of their nuptials, a charter, granting to him the lands comprehended in the Earldom of Ross, and re-erecting them into the same honour in his favour. This charter contains not a word about the title †, which, nevertheless, was enjoyed by him. In another charter, dated only ten days after the former, that nobleman is styled Earl of Ross ‡.

May 15.
1565.

May 25.
1565.
July 20.
1565.

The only things, either directly or expressly conferred in the foregoing instances, and in many others which might be quoted, are the noble siefs: Yet the persons to whom these were granted bore the titles corresponding to the denominations given to their estates. Hence, in old charters, the title and the dignity of Earl are sometimes asserted to be appendants of an Earldom, and enumerated among the privileges belonging to an estate raised to this denomination ||.

In those days they seem not to have apprehended it to be even possible for an Earl to exist without a Comitatus, lands erected into

Morton.

* Parl. 1567. c. 19. 20.—Spotswood's Pastoral Letter published in Keith, p. 591. Parl. 1579, c. 10.

† Record of charters, B. 32. No 431.

‡ Record of charters, B. 32. No 500. 458.—Ad. Case, ch. 4. p. 46.—Keith, p. 281.

|| Robert I. conveyed to his brother Edward Bruce the Earldom of Carrick, together with the name, the right, and the dignity of an Earl, and all other liberties, commodities, easements, and appendants, belonging to that Earldom: 'Totum Comitatus de Carrick, per omnes rectas metas et divisas suas, cum nomine, jure, et dignitate Comitatus, et cum omnibus aliis libertatibus, commoditatibus, ayssiamentis, et justis pertinentiis ad dictum Comitatum spectantibus.' APPEN. BRIEF, 14.

into an Earldom. In 1458, James II. by the Bishop of Brechin, his Chancellor, declared in parliament his purpose of creating Lord Dalkeith an Earl, with the style of Morton. Lord Borthwick, who heard this declaration, imagining that the lands of Morton were meant to be granted to Dalkeith, rose, and, after observing that they belonged to his sister Lady Dalkeith and her son William Douglas, beseeched his Majesty that nothing might be done prejudicial to their right in them. The Chancellor answered, That it was not proposed to confer on Lord Dalkeith a title in that Earldom for the lands of Morton in Nithsdale, but for those of Morton in Caldercleir. It must then have been understood, that, at carrying the Royal intention into execution, it was necessary to raise the lands of Morton to the dignity of an Earldom, and to vest them in the person ennobled *.

Rofs, &c.

James Stewart, second son of James III. had, at different times, obtained from his father grants of the lands which formed the Dukedom of Rofs, the Marquifate of Ormond, the Earldom of Ardmanach, the Lordship of Brechin, and the Lordship of Navar, and enjoyed the titles corresponding to them †. But, under an excellent tutor, Shaw abbot of Paisley, having acquired something in itself perhaps little less valuable, a high relish of the tranquil and ingenuous pleasures of literature and of philosophy, that young Prince chose to embrace the spiritual vocation; and having been promoted, at an age hardly canonical, to the Archbishoprick of

* Ad. Cafe, ch. 4.

† Record of charters, B. 9. No 43. 23d Jan. 1480-1. No 60. 12th April 1481.—Records of Parl. 29th Jan. 1487-8.—Crawford's Officers of State, p. 58.—Ad. Cafe, ch. 4. p. 56.—Parl. 1489, c. 25.

of St Andrews, and to the Commendatorship of the Abbey of Dunfermline, two great ecclesiastical preferments, as well as to the office of Chancellor, proposed to surrender his temporal estates to his brother James IV. This step, it was foreseen, would divest him of the honours derived from those lands: Therefore, in the instrument of resignation, a particle of each fief, still to bear the noble denomination proper to its rank, was excepted from the surrender, and reserved to his grace, in order to preserve to him the dignities reciprocating to them *.

S E C T. VI.

Dignities and Titles, derived from noble Fiefs, on alienation passed along with the estates from the former proprietors to the new acquirers.

IN exact conformity to the foregoing principles, we find, that, in ancient times, estates erected into honours, on alienation, carried the dignities annexed to them from the former to the new owners; and that the titles or styles, no less than the jurisdictions and other rights, went along with the lands. A gentleman, on selling his Barony, ceased to be a Baron. This consequence follows on a transfer or sale even at present; and it has already been proved, but shall afterwards be further established, that, in old, much less disparity subsisted between a Barony and other dignities

I than

* Instrument of resignation and reservation, published in Ad. Case, ch. 4.

than is commonly imagined in
 son to whom lands erected into
 ting the estate, ceased to be styled
 longer Comes, or owner of the
 the person to whom the dignified
 become the person to whom the

Wigton.

In 1371, Thomas Fleming,
 Douglas, Lord of Galloway, and
 Galloway, which in 1342 had
 Malcolm Fleming †, a nobleman
 the descendents of Bruce, and
 vour by that Prince into an Ear
 ton. Men, after the honours
 come legally extinct, forbear
 seizure, to use the styles borne
 themselves, and others, being
 which do not interest them, ra
 pellations on those commonly
 well authenticated, that Thom
 incorporated into the Earldom
 appellation of his family, and c
 In the deed of sale executed b
 Earl of Wigton; but, in a Roy
 1375, he is called Thomas Fl
 of Wigton ‡: And none of

* Craig, L. 1. d. 12. § 23. 25.: d. 1.
 t. 3. § 83. 84.: B. 1. t. 2. § 30.— Eff
 the end of the volume.

† Charter in Crawford's Peerage, tit.

‡ Thomas Fleming de Fulwood, du
 p. 50.

TORIAL HONOURS.

imagined in our days. Accordingly, a per-
 rected into an Earldom belonged, on aliena-
 to be styled Earl, because in fact he was no
 ner of the Earldom; and that title passed to
 e dignified fief was conveyed, as he was now
 whom the Comitatus pertained *.

Fleming, Earl of Wigton, sold to Archibald
 alloway, a considerable territory situated in
 1342 had been granted by David II. to Sir
 a nobleman distinguished by his loyalty to
 ruce, and which had been erected in his fa-
 to an Earldom, termed the Earldom of Wig-
 e honours enjoyed by their families have be-
 forbear not always, even in the case of for-
 yles borne either by their ancestors or by
 rs, being seldom disposed to dispute trifles
 them, rarely refuse to confer acceptable ap-
 mmonly distinguished by them: But it seems
 hat Thomas Fleming, after selling the lands
 e Earldom of Wigton, resumed the ancient
 ily, and ceased to be termed Earl of Wigton.
 xecuted by him in 1371, he is denominated
 , in a Royal charter granted by Robert II. in
 homas Fleming of Fulwood, formerly Earl
 none of his heirs either carried or pretended
 to

23. 25.: d. 10. § 16.: L. 3. d. 7. § 9.—Macdowal, B. 2.
 § 30.—Essay, Honour, Dignity.—See note (D) at

Peerage, title WIGTON.

Fulwood, dudum Comes de Wigton.—Ad. Case, ch. 4.

had compelled to surrender it. Perfect regularity is not constantly observed in the titular names carried by noble families ; and all the titles, to which noblemen possess an indisputable right, are seldom recited, either in writs in which they are occasionally mentioned, or even in deeds granted by themselves. It is not extraordinary, therefore, that no documents are now extant, which prove Archibald Douglas to have assumed the title of Earl of Wigton ; but is not unlikely that he bore it at least in deeds immediately relating to that estate, and is certain that one of his descendants took it ; a proof, that it was understood to belong to his family.

Buchan.

In 1406, Robert Stewart, the Duke of Albany, who was a long time regent of Scotland, conveyed the Earldom of Buchan, then his property, to his son John Stewart. In the charter which completed the transfer, he is styled Duke of Albany, Earl of Menteith, and Earl of Buchan : But, in another charter, granted within two days, by which he confirmed the former, he ceases to term himself Earl of Buchan *. This title, as well as the lands, had gone to John Stewart, the grantee of the Earldom. During the wars, waged in France by Henry V. with a success of which Englishmen are still fond to boast, seven thousand auxiliaries were sent by the States of Scotland under the command of this nobleman, to the assistance of the Dauphin, their ancient ally, who reigned afterwards under the name of Charles VII. On that expedition, young Stewart is reported, with his own hand, to have killed, at Baugé, the Duke of Clarence, brother of the King of England : On account of the bravery displayed, and services

1419.

* Ad. case, ch. 6. p. 155.—Crawford's officers of state, p. 307.

vices rendered by him there, Mezerai says, the Dauphin bestowed the sword of Constable on the Earl of Buchan; and under this title he is numbered among those who fell in 1424, at the battle of Vernueil. Archibald Douglas, grandson of the Lord of Galloway, was one of the volunteers who on that occasion passed into France, and choosing, in a foreign country, in which his quality could not be universally known, to carry that title which should readily convey a high idea of his elevated degree, you will find him in the French, as well as the Scottish historians, styled Earl of Wigton *.

Pitfcottie, in his curious account of the brothers of James III. relates that the eldest Alexander, Duke of Albany, who had been appointed by his father Warden of the East Marches, "had in his hand, at that time, the castle of Dunbar, with the living thereof pertaining to the Earl of March;" but that Lord Hume, under pretext of his high office of Great Chamberlain of the Crown, would not suffer the tenants of the estate to pay their rents to the Duke; and that Alexander, "commoved with the same, spared not to ride the ground-bounds and lands of the said Earldom of March, and there uptake the said profits and duties at his own pleasure." Hence Alexander is there entitled, by Pitfcottie, Earl of March, as well as Duke of Albany †.

March.

In

* Fordun, XV. 31. 33. 34. 35.—XVI. 25.—Boet. XVI. near the end.—Major, VI. 9.—Buchan. X. 20. sqq. 43. sqq.—Leslie, VII. 259.—Hawthornden, p. 33. 34.—Mezerai on the years 1421, of Charles VI. and 1424 of Charles VII. of France,—Hume, ch. 19. 20.—Rymer, VIII. 735.: IX. 48.: X. 308. 332.: XI. 326.

† Pitfcottie, p. 132. 133.—Parl. 1434, c. 151.—Parl. 1455, c. 47.—Parl. 1483, c. 106. § 3.—Rymer, XI. 423.

Orkney and
Caithness.

In 1455, William Sinclair, the Earl of Orkney, who erected the beautiful chapel still standing at Roslin, obtained from James II. a grant of the Earldom of Caithness, after which he was styled Earl of Caithness, as well as Earl of Orkney. About 1471, the Earldom of Orkney was surrendered by him to the Crown; and being thereby divested of the estate, he laid aside the title belonging to it, and was thenceforth called Earl of Caithness alone. This nobleman was Chancellor of Scotland; an office of first influence, as well as highest rank, both in the state and in the law*.

Striking instances might also be brought from the ancient family of Marre: But, for reasons which will afterwards be apparent, I shall not produce them till next chapter. Meantime, your Lordship will easily perceive the import of the preceding observations.

Recapitulation.

Dukes, Marquisses, Earls, Lords; the owners of Dukedoms, Marquifates, Earldoms, and Lordships; had not, before the year 1587, a firmer right than other freeholders of the King, to sit in the national convention: The jurisdiction belonging to them was not more extensive than that enjoyed by every inferior person whose lands were erected into a Barony: The only things, in which any difference subsisted between them among themselves, were the rank and the appellation peculiar to each order: Degree and title were also the only points in which they differed from those commoners who were Barons. They were therefore no more than a superior species of the people, termed Lairds by the Scots.

* Ad. case, ch. 4. p. 45.—Crawford's Officers of State, p. 34.—See note (E.) at the end of the volume.

Scots. It follows, that in ancient times territorial honours were no more than 'Titles * commonly given to owners of estates raised to the denominations reciprocating to them, and implying precedence on account of their superior extent or higher value, as well as of the determinate rank supposed to belong, or to have been assigned originally, to each appellation.'

Definition.

PART II.

* Buchanan, VI. 52.

P A R T II.

Rules, by which Territorial Honours descended before the year 1587.

THE preceding definition leads to important conclusions, which will illustrate the genuine nature of those ancient dignities, and, if just, will confirm the foregoing account of them, as each proposition, deduced from it theoretically, ought then to be found agreeable to facts; and in this way the consequences, which seem on an accurate argument to follow from it *a priori*, will be completely established analytically by experiment. These propositions are no more than corollaries implied in the general principle, 'That titles or honours were anciently incorporated ' parts of noble fiefs raised to the denominations reciprocating to ' them.'

S E C T.

S E C T. I.

Before 1587 Territorial Honours, accompanying the noble lands, were descendible with them to Heirs-general, female as well as male.

FIRST, then, I observe, that, in all cases, prior to the year 1587, in which lands were erected into Earldoms or other dignities, or in which honorary titles were derived from noble fiefs, the honours were descendible to heirs-general, female as well as male, to whom the grounds raised to them devolved. Every part of any thing must equally belong to its owner; and women appear never to have been incapable, in Scotland, either of holding property in lands, or of succeeding to them. The styles or the titles, being incorporated parts of the dignified estates, could not be separated, more than the proprietary jurisdictions annexed to them, from the integral subjects in which they inhered: And it is no objection, that these implied a right to sit in parliament; for of old every species of freehold subjected to the same burden.

An estate erected into a barony was anciently, and still is, descendible, in the ordinary course of legal succession, to heirs-general, no less than a simple freehold. The person, to whom the Barony belongs, is the only one who can be termed the Baron, and a female, proprietrix of a Barony, is entitled to the rank

K

as

as well as the power implied in this denomination : Nevertheless, a woman could not formerly, no more than she can now, sit in parliament; a privilege, however, appurtenant to her freehold. That incapacity was personal and temporary only, arising from her sex : But she could exercise every right appendant to her estate, which was exercisable by a female. She could also transmit her Barony, with every privilege annexed to it, unimpaired, either to her heirs, or to purchasers; and these became fully entitled to enjoy it in all its amplitude, as soon as they ceased to be disabled by minority, by sex, or by like causes. No other heir, male or female, could possibly be the Baron, or have any right to this appellation, as the Barony, in which that title inhered, belonged not to him : No person could be either entitled to a seat, or bound to serve in parliament, by virtue of a freehold pertaining to another : One could not claim over another's grounds a jurisdiction conferred on their owner alone : And it is impossible to point out any privilege, higher or lower, annexed to the estate, which a person different from its proprietor could possess on a Barony, belonging not to himself, but to her.

From Baronies a transition is easily made to Earldoms, which indeed were no more than a higher order of Baronies, differing from them only in name and in rank. Lands exalted to this elevated dignity were not limited to heirs-male, but, like simple freeholds, were descendible at common law to heirs-general : The person, therefore, female or male, who happened by succession to become owner of a Comitatus, being the Comes, could not fail, more than one who acquired it by purchase, to be denominated Countess or Earl, and would be allowed both the title and the precedence due to the proprietor of an estate raised to this honour.

A

A female, indeed, to whom the nobilitated lands devolved, could not give counsel, or perform service in parliament: No more could a Baroness or a Freeholdrix; yet that right was inherent in the one dignity as much as in the other: Women could not serve in the field; they were not, however, disabled on that account from inheriting fiefs held by military tenure: Even jurisdiction is not exercisable by them in person; but they are not incapable of enjoying lands to which it is annexed: And they could always transmit their estates, together with the whole appendants of them, to their heirs, as well as preserve them entire.

A principle, in itself evident, needs not be confirmed by examples. Scottish history, as well as old records, are full of them. Almost all the ancient Earldoms of Scotland were territorial honours. The estates, belonging to the persons who possessed those dignities, are constantly found, in the words used to describe them, to have been erected into Comitatus of the denominations borne by their owners; and, in every instance, titles corresponding to them were carried by those who enjoyed the dignified lands.

In 1270, on the death of one of those enthusiastic spirits who engaged in the delirious adventure of the Crusades, Adam Earl of Carrick, in that holy land which he had marched from the farthest region of the west to deliver out of the unhallowed hands of the Infidels, the Earldom of Carrick devolved to his only daughter Margaret, who not only possessed the estate, but bore the title of Countess of Carrick. This Lady, one day a-hunting, cast eyes on Robert Bruce, son of the Lord of Annandale, and being captivated by his appearance, prevailed on him, not without a re-

Carrick.

sistence on his part, to accept of an invitation to her castle of Turnberry. The impassioned fondness, discovered by those forward advances, produced not the resilient aversion which behaviour less indelicate might have had on a mind either more suspicious or less susceptible than that of Bruce. A marriage was soon concluded between them. Their eldest son was that gallant King, the first Robert of Scotland: And this Prince, having obtained, on the death of his mother, a proper right to the Earldom, was distinguished, before his accession, by the title of Earl of Carrick *.

Fife.

On the death of Duncan Macduff, the thirteenth Earl of Fife, heir-male lineally descended from that Macduff who killed Macbeth, and who is rendered famous even in England by Shakespeare's tragedy, Isabel, his only child, succeeded to him in the estate, and was universally acknowledged Countess of Fife. In this character she surrendered the Earldom, that a new grant might be made of it by David II. to her second husband Sir Thomas Bisset, a Royal favourite, thereby to frustrate a prior settlement which had been executed by her father. But in 1371, under the title of Countess of Fife, after all her husbands had died, she entered into an indenture, in terms agreeable to the former destination of her lands, engaging to resign the Earldom, and to settle it on her kinsman Robert Stewart Earl of Menteith. The Earl of Menteith, having in consequence succeeded to the lands, was

* Fordun, X. 29. : XI. 13. &c. — Boet. l. 13. 14. — Winton, c. 139. — Major, IV. 12. 13. 17. &c. — Buchanan, VIII. 7. 8. &c. — Rymer, II. 178. 189. 266. 471. 614. 643. 714. 988. 997. : III. 620. — Dalrymple's Collections, p. 363. &c. — Mackenzie's Cond. p. 7. : And Lovat's Answers, p. 11. — Ad. Case, ch. 5. p. 18.

was thenceforth styled Earl of Fife, as well as Earl of Menteith, and retained that title even after he had become Duke of Albany. His son, Murdoc, also bore it. At the coronation of James I. Murdoc exercised the privilege, belonging to him in that character, of placing the King in his chair of state, and of putting the crown on his head, at the ceremony of his inauguration: And it was by his forfeiture that the palace of Falkland, the seat of the family, and the rest of the Earldom, came to the Crown*.

Among all the noble families of whose high antiquity vanity is sometimes apt to boast, the house of Marre seems to be that which can at once carry its nobility to the remotest period, and authenticate it by the best evidence†. Thomas Marre, one of its ancient Earls, dying without issue in 1377, was succeeded in both title and estate by his sister Margaret. This Lady married William Douglas Earl of Douglas; the nobleman, who, on the death of David II. revived the claim which seniority of lineage had given his family to the crown of Scotland. Margaret, Countess of Marre, survived her husband: In consequence, their son James, during her life, bore the title of Earl of Douglas, and on her death added

Marre and
Douglas.

* Sibbald's History of Fife, p. 97. — Crawford's Officers of State, p. 301. 307. — Anderson's Diplomata, No 57. 61. 62. 64. — Fordun, XIV. 49. 51. 52. 55.: XV. 4. 37.: XVI. 2. 9. 10. — Boet. l. 16. — Buchan. IX. 64.: X. 8. 27. 28. 47. — Leslie, VII. 262. — Hawthornden, p. 15. 19. 22. 23. 46. — Rymer, VIII. 35. 45. 635. 708. 737.: IX. 45. 60.: X. 298. — Mackenzie's Cond. p. 8. and Lovat's Answers, p. 13. 14. — Ad. Case, ch. 5. p. 23. — Parl. 1455, c. 43.

† See note (B) at the end of the volume.

added that of Marre to the dignity which had already devolved to him from his father *.

James Douglas, Earl of Marre and Earl of Douglas, was killed in that celebrated battle in which his troops gained, at Otterburn, a complete victory over Henry Percy and the English; and perhaps his name is better known from the admired ballad of Chevy Chace, and from Mr Addison's criticism upon it, than from the whole body of the Scottish historians, not excepting the classical paragraph in which Buchanan records the heroic circumstances of his fall. On his death, without legitimate children, the Earldom and the honours of Douglas descended to Archibald, his brother by the father; but those of Marre went to his sister-german Isabella †.

Sutherland.

In 1514, on the death of John Sutherland, Earl of Sutherland, the Earldom devolved on his sister Elisabeth, who, in consequence of her property of the estate, became Countess of Sutherland, and transmitted the dignity as well as the lands to her descendants ‡.

Sutherland,

* Fordun, XI. 13.: XIV. 49. — Dalrymple's Collections, p. 380. — Crawford's Officers of State, p. 298. — Mackenzie's Cond.; and Lovat's Answers to them. — Case of the Countess of Sutherland, p. 10. — Ad. Case, ch. 5. p. 36. — Rymer, VII. 175.

† Fordun, XIV. 53. — Boet. 16. — Buchan. IX. 57. 58. 59. — Spectator, No 70. 74. — Rymer, VII. 2. 45. 175. 468. — Lovat's Papers, *ibid.* — Sutherland Cases, *ibid.*

‡ Resolution of the House of Lords, adjudging, 'That the titles, honours, and dignity of the Earldom of Sutherland, descended to Elizabeth, the wife of Adam Gordon, upon the death of her brother John Earl of Sutherland without issue in 1514.'

Sutherland, then heir-male of the family, and lineally sprung from the ancient Earls, pretended not to either *.

S E C T. II.

To Heirs-male.

IN ancient times noble fiefs did not always descend, more than other landed estates, to the nearest heirs of their last owners. Remote males were sometimes preferred by settlements to near females: Brothers, for instance, to daughters; uncles to sisters; cousins to nieces; or the like. Still, however, in cases in which dignified fiefs went not to heirs-general, but were limited to heirs-male, the honours accompanied the property, and were constantly enjoyed by those who succeeded to the lands.

William Douglas, the sixth Earl of Douglas †, by his violence and by his enormities, laid the ministers of James II. under a necessity of enticing him and his brother David, by an imposing dissimulation of much kindness, into the castle of Edinburgh, and of seizing that opportunity, immediately after having regaled them with a sumptuous entertainment, of leading them to instant execution, without even the specious form of a deceitful

Douglas.

* See note (F) at the end of the volume.

† That Earl of Douglas was commonly attended by a large body of horse; Pit-scottie says a thousand, two thousand, or more, an incredible number; and even affected a state equal to royalty, making knights, creating noblemen, and holding parliaments within his own territories.

deceitful trial. On their death without issue, the Earldom of Douglas, in consequence of an entail, went to their father's brother, James Douglas, the heir male, by whom the title was accordingly enjoyed : But the large estates in Galloway, in Annandale, in Balveny, and in Ormond, which had been held by William in fee simple, descended to his sister Beatrix, the Lady recorded for her beauty or for her fortune under the name of the Fair Maid of Galloway *.

Lorn.

In 1452, John Stewart, Lord Lorn, settled his Lordship, or noble lands of Lorn, on the heirs-male of his body, and, in default of them, on his brothers, Walter, John, Allan, and James, successively one after another, and on other collateral males. On his death in 1469, without male issue, the estate descended not to any of his daughters, but passed under that settlement to his brother Walter, who enjoyed the title, as he was owner of the Lordship †.

Angus.

Archibald Earl of Angus, a nephew of Gavin Douglas the translator of Virgil's *Æneid*, married Margaret, eldest daughter of Henry VII. of England ; and his descendants still inherit the crowns of Great Britain, of Sardinia, of France, of Spain, and of Prussia. Nevertheless, the title descended not to their daughter, Lady Margaret Douglas, wife of the Earl of Lennox, mother of Lord Darnley, grandmother of James VI. niece of Henry
ry

* Pitfcottie, p. 14—33.—Buchanan, XI. 9—17.—Hume's History of the Douglases.—Hawthornden, p. 58. 61. 65.

† Memor. for Lord Lovat, p. 6.—Supplemental Case of Sir R. Gordon, p. 17.—Ad. Case, ch. 6. p. 86.—Stewart's History of the Stewarts, p. 169, 170.—Crawford's Officers of State, p. 44.

ry VIII. and first cousin of Queen Elizabeth. In 1547, he had devised the Earldom of Angus, and had taken a charter settling it on his heirs-male. Hence, on his death, the estate went to his nephew David Douglas, by whom in consequence the dignity implied in it was possessed *.

S E C T. III.

To those eldest Heirs-portioners, who succeeded to the noble Fiefs without division.

LANDED estates, in all cases in which their descent is not predetermined by settlements, but left to proceed of itself in the course directed by law, in which their last owners leave either more daughters than one, or representatives of more, and in which males exist not who are entitled to be preferred in the inheritance, descend in coparcenary, or are equally divided by branches, among all the females, and the representatives of those who are dead. An equal partition is also made by stems among heirs-portioners in other cases. But if the rule be general, that in ancient times the nobility of lands accompanied the fiefs raised to honour, then in cases in which, before 1587, any noble estate, that should otherwise have been divided among parceners, went en-

L

tirely

* Hawthornden, p. 208. 209. 216. — Pitscottie, p. 218. 233. — Lovat's Ad. Cond. p. 5. 6. — Sup. Case, p. 21. — Ad. Case, ch. 6. p. 99. 100. — Crawford's Officers of State, p. 75.

tirely to one of them, the heiress, to whom the grounds belonged, must have enjoyed the dignity incorporated into them.

Athole.

Henry Earl of Athole died without male issue, but left at least two daughters; Isabel, who married Thomas of Galloway, and Fernelith, who married David de Hastings: The Earldom went entire to Isabel, the eldest, who in consequence became Countess of Athole; and the dignity, as well as the estate, descended from her to her son Patrick Earl of Athole*.

Rofs.

William Rofs, Earl of Rofs †, left two daughters, Euphame and Joanna, between whom, at common law, the Earldom, on his death, should have parted. But the estate, in consequence of a settlement made by their father, went all to Euphame, the eldest. The charter, which followed on that deed, mentions not the honours, and is confined to the lands: The title, however, as well as the Earldom, was both possessed by her, and transmitted to her posterity ‡.

Thomas

* Mackenzie's Cat. p. 1. and his Cond. p. 4. — Lovat's Answers to it, p. 4. — Dalrymple's Collections, p. 379. — Chart. Dunferm. — Ad. Case, ch. 5. p. 8.

† The Earl of Rofs, who, in 1339, at the siege of Perth, which was then held by the English for Baliol, by an aqueduct carried under ground, diverted the water out of the Fosse that defended the town, and, by opening an easy access to the foot of the walls, contributed greatly towards compelling the besieged to surrender to the Steward of Scotland.

‡ Charter, dated 23d October 1370. — Mackenzie's Cond. p. 13. — Lovat's Answers to it, p. 23. — Suth. Case, p. 10. — Suth. Appen. No 3. — Sup. Case, p. 32. — Ad. Case, ch. 5. p. 26. — Major, VI. 12. — Buchanan, X. 31. — Leslie, VII. p. 258.

Thomas Stewart, Earl of Angus, a descendant of that Stewart *, Lord of Bute, from whom both Charles I. and Oliver Cromwell were sprung, died without issue in 1377; but he had two sisters, Margaret and Elisabeth. The Earldom was not, however, divided between them. The estate went wholly to Margaret. This Lady enjoyed the honours, as well as the lands; and having married the Earl of Douglas, by whom she had a son George, transmitted both the dignity and the estate of Angus from the name of Stewart to the name of Douglas †.

Angus.

James Stewart, the Earl of Moray ‡, who, an impartial historian || relates, was still remembered with fondness in his time under the honourable appellation of the Good Regent, was assassinated in 1571. His only children were two daughters, Elisabeth, who married Sir James Stewart of Down, and Mary, who married Francis Hay, Earl of Errol: And, on his assassination, his Earldom was not parted between them, but, in consequence either of a settlement under which the fief stood devised at his death, of an agreement concluded after it between the two sisters, or of

Moray.

L 1/2

the

* Sir John Stewart of Bute was slain in the great battle fought at Falkirk, to which the English army was led against Sir William Wallace by Edward I. in person. The Earl of Angus was his great-great-grandson and heir-male.

† Mackenzie's Cond. of Instances, p. 1. — Cat. p. 1. — Lovat's Ad. Cond. p. 4. — His Answers, p. 3. — Suth. Cafe, p. 10. — Sup. Cafe, p. 21. — Ad. Cafe, ch. 5. p. 33. — Anderson's Diplomata, No 57. — Marriage-articles, 24th May 1397, and three Charters, (No 2. 3. 5.), lately published in Appendix II. for Archibald Douglas, Esq;

‡ February 10. 1561-2.

|| Spotswood, p. 234. of the edition printed in folio, at London, in 1677.

the early death of Mary, the youngest, without issue, before obtaining investiture in her portion of the lands, went entire to the eldest. Elisabeth possessed the dignity, as well as the estate; and both are still enjoyed by her descendants*.

S E C T. IV.

To Heirs different from any of the three former species.

IN ancient times, territorial honours were not limited in their descent to any determinate line, and did not always devolve either to the heir-general, or even to the heir-male, of the last possessor of them, but, without observing any fixed course, frequently went, in consequence of settlements, to a person different from both, sometimes to a younger son, sometimes to a younger daughter. Still, however, amidst all that variety, it seems to be pretty certain, that they were constantly enjoyed by the person, female or male, to whom the fiefs ennobled by them descended.

Moray.

James Dunbar, Earl of Moray, had two daughters. Janet, the eldest, during her father's life, married Sir James Crichton, who was eldest son of the famous Chancellor, and who was himself raised to the Great Chamberlainship of Scotland. Mary, the youngest, after her father's death, married Archibald Douglas, a younger

* Sup. Cafe, p. 20. — Ad. Cafe, ch. 6. p. 100. 115. — Brief of Sir R. Gordon, p. 120.

younger son of the Earl of Douglas. The Earldom of Moray was not parted between them, and devolved not to Janet. The high credit possessed by her husband and by his friends, together with her natural prerogative of seniority, would unquestionably protect her from any gross injustice : Nevertheless, Janet got no more than the lands of Frendraught. The Earldom of Moray, probably in consequence of a settlement which had been executed by her father, went entire to Mary, a Ward of the Crown, by whom, accordingly, the dignity as well as the estate was enjoyed. James II. made a gift of her wardship to Archibald Douglas, who, having thereby acquired possession of her lands, availed himself of the advantages, thus afforded him by the favour of her sovereign, to obtain her person in marriage. On this occasion the Earldom passed from her to her husband : Archibald Douglas became Earl of Moray; and sharing both in the enmities and in the fate of his brother, who, under a promise of safety solemnly contracted to him, had been ensnared into the castle of Stirling, and whose foul murder has infixed an indelible stain on the Royal hand which perpetrated it there, was attainted by parliament in 1455. On his forfeiture, the Earldom was granted by the King to Janet, and the title was a short time borne by her : But being unable, in a country then intractable, in which the Gordons, her enemies, domineered, to maintain possession of the lands, she restored the estate to the Crown, and retained not the honours *.

Alexander

* Mackenzie's Cat. p. 9.—His Cond. p. 12.—Lovat's Answer, p. 20.—Dalrymple's Collections, p. 346.—Pitfcottie, p. 46. 47. 48. 75. 76. 80. 93.—Buchanan, XI. 26. &c.—Crawford's Officers of State, p. 311.—Hawthornden, p. 71. 80. 83. 86. 87. 88. 89.—Parl. 1455, p. 34. 36.—Rymer, XI. 285. 300. 326. 334.

Huntley.

Alexander Seton, the first Earl of Huntley, was thrice married. His first wife brought him no children. By his second, Giles Hay, heiress of John Hay of Tillibody in Clacmannanshire, whose estate was stipulated to descend to her own children, he had a son, Alexander Seton de Gordon. His third wife, Elizabeth Crichton, a daughter of the Chancellor, bore him a son, named George; and, out of respect to an alliance which must then have been reckoned honourable, as well perhaps as to prevent the extinction of either family, the Earldom of Huntley was settled by him on the heirs whom he might have by her. In 1450 the Earl obtained from James II. a charter, granting that noble fief, in terms of his settlement, to himself and to them. On his death the dignity devolved not to his eldest son, Alexander Seton de Gordon, but went to his second son, George, who succeeded to the estate; and George transmitted both to his posterity. Alexander Seton, the eldest son, got no more than the lands of Tillibody, which had belonged to his mother Giles Hay; and his descendants, who, I believe, are possessed at present of the barony of Touch, notwithstanding the seniority of their lineage, are still commoners: But the Duke of Gordon, who is sprung only from George, the younger branch, inherits the honours as well as the estate of Huntley*.

SECT.

* Ad. Case, ch. 4. p. 46.

S E C T. V.

Were borne by Husbands in right of their Wives.

THE strict union formed by wedlock establishes a species of society between every couple connected by that sacred band. Their common children, in whose company both parents find great delight, and whose welfare their hearts are fond to promote, render their interests one, and, co-operating with the affection entertained by them for each other, naturally engage them to live together in the same house. A family, to be governed and supported, is thus produced by their cohabitation : And the male, excelling in strength, and abler to labour, has in most nations arrogated to himself, amidst artful appearances of much obsequiousness, a real superiority over the female. As his rights reciprocate to his toils, his obligations are proportioned to his abilities. The master of the family is bound to maintain his own household ; and moveables being the only things capable of being turned directly into food or clothes, the man, in consequence of the burdens to which his dominion subjects him, acquires the property of the whole personal estate, which either belongs to his wife at entering into marriage, or accrues to her during its subsistence. All the fruits, producible by her real estate, being moveable, his marital interest implies also a right to possess it, and to reap them. Hence in Scotland husbands obtained the titles annexed to the fiefs of their wives, as the possession, the management,

nagement, and the substantial advantages derivable from both, were enjoyed by the man *. It is not unusual, even at present, for gentlemen to assume the surnames of heiresses whom they marry; and the additions taken by them are often borrowed from lands with which they are connected in this transitory manner.

Menteith.

Robert Stewart, the Prince by whom the realm of Scotland was governed with splendour till he died at the advanced age of fourscore, was bestowed by his father Robert II. at an early period of life, on Margaret Menteith, heiress of the rich Earldom of Menteith, and in consequence became Earl of Menteith; a title which was retained by him even after he had been created Duke of Albany. You will find him taking it in a lofty letter, addressed to Henry IV. of England, in which, in the language affected by Royalty and by the Church †, he describes himself, 'By the grace of God, 'son of the King, and governor of the kingdom of Scotland ‡.'

Rofs.

His brother, Alexander Stewart, the Earl of Buchan, who burnt that beautiful edifice of which some elegant remains are still to be seen at Elgin ||, and whom, for that and similar violences,

* Dalrymple's Collections, p. 220.

† Rymer, II. 488.

‡ Crawford's Officers of State, p. 301. 307. — Dalrymple's Collections, p. 392. 393. — Fordun, XV. 37. — Major, VI. 10. — Mackenzie's Cond. p. 11. and his Cat. p. 9. — Suth. Cafe, p. 12. — Sup. Cafe, p. 34. — Ad. Cafe, ch. 5. p. 18. 24. : ch. 7. p. 173. — Sibbald's Collections, p. 97. — Rymer, VIII. 635. 708. 737. : IX. 45. 60. : X. 298. — Anderson's Diplomata, No 57. 61. 62. 64. — Crawford's Peerage, p. 100. — Sir David Dalrymple's Remarks on the History of Scotland, ch. 21.

|| See a View of the Cathedral of Murray in Cordiner's Antiquities, plates 8th and 9th.

lences, the clergy have transmitted to posterity under the name of the Wolf of Badenoch *, espoused Euphame Countess of Ross; a woman, whose shrewishness even his ferocity was unable to tame. Amidst the misunderstandings which arose between them, and which could not be terminated by the solemn interposition of their ordinaries, it is not likely that his pride allowed him to assume the title of Earl of Ross. But her former husband, Sir Walter Leslie, with whom probably she had lived on better terms than with Buchan, appears to have carried it †.

Alexander Stewart, an illegitimate son of that Earl of Buchan, is a personage distinguished in the Scottish history by the variety and the singularity of his adventures and of his character ‡. All his enterprises, even those undertaken by him in his early youth, mark a masculine and bold, but somewhat irregular and romantic understanding. His first public appearances were made at the head of a lawless banditti, by whom extensive ravages were committed around them: And having then thrown wishful eyes on the ample estate enjoyed by Isabella Douglas Countess of Marre, his suit was warmly supported by that barbarous phalanx. Laying
M ing

Marre.

* Fordun, XIV. 56.—Boet. XVI.—Major, VI. 6.—Buchanan, IX. 67.—Shaw's History of Moray.

† Rymer, VII. 53. 215.—Fordun, XVI. 15.—Buchanan, X. 31.—Leslie, VII. 258.—Ad. Case, ch. 5. p. 27.: ch. 7. p. 174.—Major, VI. 12.—Hawthornden, p. 27.

‡ It was by his vigour, that in 1411, with an army expeditiously collected in the counties situated between the Tay and the Spey, an effectual check was given, in a bloody battle fought at Harlaw, to a rebellious attempt made by Donald Lord of the Isles, an ally of Henry IV. of England, to maintain possession of the extensive Earldom of Ross. Rymer, VIII. 527.

ing siege, under their auspices, to her castle of Kildrummy *, the daring adventurer, by a courtship conducted in that rough, but ardent manner, succeeded no less in winning her affection than in obtaining her person in marriage. In consequence Alexander Stewart arrived at the dignity of Earl of Marre, because in her right he was possessed of the Earldom †.

Buchan.

Christian Stewart, Countess of Buchan, whose father, the Master, was slain at Pinky ‡, married Robert Douglas, a brother (by the mother) of Murray the Regent. Her husband, in her right, became Earl of Buchan, and transferred that dignity from the house of Stewart to the name of Douglas §.

Sutherland.

In 1771 it was adjudged by the House of Lords, That Adam Gordon, (a son of the Earl of Huntley), who had married Elisabeth Sutherland, Countess of Sutherland, assumed in her right the honours and the dignity belonging to that Earldom. In private

* Cordiner, p. 15.

† Fordun, XV. 19. 21.: XVI. 17. 25.—Boet. XVII.—Major, VI. 10. 12. 13.—Buchanan, X. 18. 33. 43. 44.—Leslie, VII.—Hawthornden, p. 27. 34.—Evergreen, I. 78.—Mackenzie's Cond. p. 11.—Ad. Case, ch. 7. p. 175.—Rymer, VIII. 450. 461. 500.: X. 332. 491.—Charter, dated 20th April 1406, by Alexander Comes de Marre.

‡ In a battle fought in 1547, by the Scots, against the forces of England, in defence of the person of their Sovereign, whom Henry VIII. out of a just regard to the political happiness of both nations, had anxiously stipulated for his son, and whom Edward's ministers wished to compel to performance of that contract.

§ Records of Parl. 1567 & 1579.—Keith, p. 452.—Anderson's Collections, II. 228.—Charter, 7th April 1574, B. 34. No 123.—Mackenzie's Cat. p. 3.—Lovat's Answers, p. 9.—Ad. Case, ch. 5. p. 63.: ch. 7. p. 176.—Pittscottie, p. 329. 352. 357.

vate deeds, in public acts, in royal grants, in privy council, the title of Earl is given him, and he enjoyed all the privileges implied in it*.

S E C T. VI.

Were perhaps taken both by Fiar and by Liferenter.

I AM apt to suspect, that, in cases in which an Earldom belonged to one person for life, and was held by another in fee, it was not uncommon for both the fiar and the liferenter to carry the title of Earl.

Robert Bruce, who married the Countess of Carrick †, had children by that Lady; and having survived her, either retained by curtesy a right to possess her estate for life, or, in consequence of the feudal offence given by her irregular marriage to her superior Lord, obtained from the Sovereign a grant of the Earldom to himself. During the minority of young Bruce, his father, after the death of his wife, perhaps to avoid the humiliating ceremony of prostrating himself in a suppliant posture, and on his bended knees swearing fealty to a Prince whose right he might be reluctant to acknowledge, a few days after Edward of England had pronounced his decision, dismissing the claim of the Lord of Anandale to the Scottish crown, executed a deed, declaring to John

Carrick.

1292.

M 2

Baliol,

* Page 78. above.—See note (G) at the end of the volume.

† Page 75. 76. above.

Baliol, that he had surrendered the fief to his son, and beseeching the King to accept of his homage for it. He seems not, however, to have made either an actual conveyance, or a formal resignation, of the Earldom: And both Robert Bruce the father, and Robert Bruce the son, bore the title of Earl of Carrick. Under it they are found on record among those who swore fealty to Edward I. *.

Levenax.

John Stewart of Darnley, in whose favour a new Earldom of Levenax was erected by James III. in 1483, out of a part of the ancient Earldom of Lennox, having surrendered that noble fief to the Crown, took a new investiture to himself for life, and to his eldest son Matthew Stewart in fee. John Stewart the father, as well as Matthew Stewart the son, was, during his life, termed Earl of Levenax †.

Angus.

George Douglas, a son of William Douglas and Margaret Stewart, Earl and Countess of Douglas and of Angus ‡, married Mary, daughter of Robert III.; and, by a royal charter issued in 1389,

* Rymer, II. 612. 614. 714. 859. — Pryne, v. 3. p. 653. — Knyghton, p. 2482. 2514. — Ad. Cafe, ch. 5. p. 21. — Fordun, X. 29. : XI. 13. — Ridpath's Border-History, p. 182.

† Indenture between John Earl of Levenax and his son, and Elisabeth Monteith and her son, dated 18th May 1490. — Charter, granted in September 1490, by Matthew Earl of Levenax to Elisabeth Monteith. — Indenture, dated 11th July 1493, between John Earl of Levenax and John Haldane of Gleneagles; — all printed, and other papers to which appeals were made, in a cause lately determined by the court of session, Jan. 23. 1781, General Fletcher v. James Ferrier.

‡ See p. 77. 78. 83. above.

1389, the Earldom of Angus was vested in his person, under a reservation of a liferent of it to the Countess. Hence George Douglas was sometimes termed Earl, as well as Lord of Angus, before the death of his mother *.

Walter Stewart Earl of Athole got from his nephew James I. a grant of the Earldom of Strathern for life, and in consequence added the title of Strathern to the other dignities possessed by him †.

Strathern.

John Stewart Earl of Buchan, after having divested himself of the property of the Earldom in favour of his son, still retained the title, in consequence of the interest which he had reserved to himself in the estate during life, notwithstanding that his granddaughter Christian Stewart ‡, who, on the death of her father, was directly seized in it, exercised the rights which were then supposed to be annexed to the fee ||.

Buchan.

SECT.

* No 3. 4. 5. of Appendix II. of Archibald Douglas, Esq; — Indenture 1410, cited in Lovat's Ad. Cond. p. 5.—Ad. Case, ch. 5. p. 33.—Sup. Case, p. 21.—Anderson's Diplomata, No 57.

† Ad. Case, ch. 5. p. 57.

‡ See p. 90. above.

|| Ad. Case, ch. 5. p. 60. 61. 62.

S E C T. VII.

Became extinct on the partition of the dignified Fief among Co-heiresses.

IF the foregoing principles be founded in truth, every cause, by which an estate was deprived of its nobility, must have effected an extinction of the honours annexed to it. In ancient times a doubt appears to have been entertained by lawyers, whether, on the alienation of part of a parcel of lands which had been united into a Barony, the piece which was reserved, as well as the part which had been alienated, did not lose the quality of union, and the other privileges implied in that condition : But it seems not to have ever been thought that each of the portions of a landed estate, which had descended to coparceners, and which had been parted among them, still retained the same feudal dignity which had belonged to the whole tenement before its division. After a partition, no solid reason can be assigned for bestowing a preference on any one of the shares above others, exactly co-ordinate to it in every respect, nor any view which can determine imagination or judgement to that partiality. Probably, therefore, titles of honour became extinct as soon as the fief, into which they were incorporated, devolved to coparceners, and was divided among them. It is true, that in the case of the succession of portioners, things which are impartible are commonly held,

held, in Scotland, to go to the eldest of the co-heireffes. This rule, however, always supposes objects which are not extinguished, and applies only to rights, such as patronages, offices, and perhaps superiorities, which form existent parts of the inheritance, and at the same time are in themselves really indivisible. It extends not to territorial honours, which are annexed to lands, and which are derived from them. A noble fief is always susceptible of an actual division, no less than ignoble grounds; and it cannot reasonably be supposed, that a dignity, originally conferred on a large extent of territory adequate to support it, was intended for each diminutive fraction into which it might be broken in a progression of generations. Nevertheless, the maxim, by which among parceners a preference is allowed to seniority in a small degree, might sometimes be adopted in the case of honours, either from favour, from necessity, or from acquiescence, and is sufficient to account for those rare instances, if any are to be found, in which heirs-female, not possessed of the whole dignified estate in consequence of settlements executed by their ancestors or of bargains made with their coparceners, enjoyed the titles originally appendant to their entire Lordships.

Magnus Earl of Caithness and Orkney, a personage who in the fourteenth century was reckoned a great man, but whose name is scarcely remembered in the present, died without male-issue; and left four daughters, co-heireffes, among whom his estate was divided. On his death the dignity became extinct*.

Caithness
and Orkney.

Duncan Lennox, Earl of Lennox, overwhelmed, at the age of eighty, in the ruin which, after the restoration of James I. befell the

Lennox.

* Lovat's Answers to Mackenzie's Cond. p. 10.

the friends of Albany *, was executed at Stirling in 1425. His eldest daughter, Isabel, whom the Duke had married, survived all their children; and on her death the Earldom of Lennox, which had not been forfeited, descended to her two sisters, (Margaret, who married Robert Monteith of Rusky, and Elisabeth, who married Sir John Stewart of Darnley), among whose descendants the estate appears to have been parted. In consequence the title became extinct †.

Herries.

William Herries, Lord Herries of Terreagles, who died in 1543 without male-issue, left three daughters, co-heiresses of his estate; Agnes, who married Sir John Maxwell; Catherine, who married Alexander Stewart of Gairles; and Janet, who married William Cockburn of Skirling. The honours, however, descended not to any of the three; and Archibald Herries of Madinpenney, the heir-male of the family, did not pretend to them. The dignity remained dormant, or rather extinct, till Sir John Maxwell and his Lady, probably in consequence of a contract with their sisters, acquired a right to the whole estate; and the lands of Terreagles had been anew erected, in 1566, into a Lordship, in favour of him and her, and the heirs-male of their bodies. After this erection, Sir John bore the title of Lord Herries; under which he is marked

* See p. 76. 77. above.

† Fordun, XVI. 9. 10. — Major, VI. 12. — Leslie, VII. 262. — Buchanan, X. 28. — Hawthornden, p. 19. 20. — Mackenzie's Cat. p. 7.: His Cond. p. 9.: Loxat's Answers to them, p. 14. — Douglas's Peerage, p. 397. 398. 399.

marked in the roll of those who sat in the great parliament of 1567*.

S E C T. VIII.

Became extinct on the devolution of the Noble Fief to the Crown.

TITLES annexed to lands became extinct, in case the noble fiefs, from which they were derived, went to the crown, either by forfeiture, by escheat, by succession, or otherwise: An event of which innumerable examples are found in history, as from the irregularity, the disjointedness, and the debility, of the government, from the temerity, the haughtiness, and the rapacity, of the gentry, and from the poverty, the barbarism, and the subjection, of the commons, few countries have been more incident than Scotland to insurrections, and even to rebellions.

One of the most memorable revolutions recorded in its annals, is that which, towards the end of the thirteenth century, ensued on the demise of Margaret, the Fair Maid of Norway, whose beauty is so fondly remembered in the Scottish Legends. Im-

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* Lovat's Answers to Mackenzie's Cond. p. 32. — Mackenzie's Remarks on them, p. 35. — Lovat's State, p. 13. — Sup. Cafe, p. 20. 27. — Ad. Cafe, ch. 6. p. 89. — Keith, p. 146. 277. 309. 317. 335. 377. 378. — Keith's Appendix, p. 130. 131. — See note (H) at the end of the volume.

portant questions concerning the legal succession to feudal dignities came to be occasionally discussed in the illustrious competition to which that mournful event gave rise : And as the judgement ultimately pronounced in it was productive of great changes both in the honours and in the property of many families in Scotland, the examples, to be cited in proof of my present proposition, may not improperly be introduced with a short account of that grand revolution. By this, perhaps not impertinent digression, a little relief will be afforded to your Lordship from genealogical deductions.

On the death of Queen Margaret, twelve competitors laid claim to the vacant throne, and, aware of the decisive importance of Edward of England's favour, they were every one, especially those who had most reason to be diffident of the solidity of their title, solicitous to gain his protection. Cumberland, after that province had been ceded to Malcom II *, had been held, by the Scottish Princes, of the Crown of England † : The direct dominion of his whole kingdom had been surrendered by William the Lion, with the advice of his Barons and of his Clergy, to Henry II. ‡ : And homage had frequently been performed by the Kings of the North for the fiefs held by them in England, and even for the realm of Scotland, to Henry and to his successors || : This right had

* Fordun, IV. 26. — Boet. XI. — Buchanan, VI. 18.

† Hume, ch. 2.

‡ Rymer, II. 562. &c. — Fordun, VIII. 24. — Boet. — Buchanan, VII.

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|| Dalrymple's Annals, p. 119. 136. 146. 153. 163. 182. — Rymer, II. 126.

had indeed been distinctly renounced by Richard I. * : But ten thousand marcs, the price stipulated, was a consideration inadequate to the splendid dignity with which his generous heart had parted; his power to alienate, without the authority of parliament, a feignory annexed to his crown, might not be perfectly indisputable; and in those days the English nation had not entirely abandoned pretensions, which were still asserted, or attempted to be revived, about the beginning of the present century. Under these circumstances, it could not have excited surprise, if an ambitious monarch either had been seduced, by a seeming repetition of a like recognition, to claim, or had grasped at any favourable opportunity to recover that superiority, whose dazzling brilliancy, producing in his vivid fancy a livelier image than obscure facts or dull deeds, might mislead his reason, or overcome the feeble resistance made by its accuracy. But, fortunately for Edward, the competitors and their partizans were little less forward to admit, than himself was eager to assert, his claim to the feudal sovereignty of Scotland; and an invitation †, which, it is probable from some evident symptoms of an apprehended civil war, had been well intended ‡, was given him to settle, by his amicable interposition, the succession to the Scottish diadem. With the unanimous consent, or tacit approbation, of the grandees of the nation, their several pretensions were submitted by all the claimants to his decision || : And the pains, the impartiality, the moderation, and the fidelity, with which the English Justinian

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heard,

* Fordun, VIII. 48. 49. — Buchanan, VII. 49. — Dalrymple's Annals, 131.

† Fordun, XI. 2. — Boet. XIV. — Buchanan, VIII. 9. — Leslie, VI.

‡ Ridpath, p. 169.

§ Rymer, II. 529. 553.

heard, examined, determined, and performed the engagements contracted by him, in that splendid cause *, have been ill requited by the injustice and the virulence with which his character and his memory have been loaded and pursued by the Scottish historians, who, in opposition to strong evidence afforded by actual honourable behaviour, have here very generally † ascribed to a Prince, peculiarly distinguished by dignity of conduct and by loftiness of mind, all the littleness of dissimulation, and meanness of cunning, ever practised by a tricky pettifogger in a provincial town. The acquisition for which Edward is charged to have sacrificed his honour, in the case of great kingdoms, is productive rather of a showy superiority, than of those substantial profits sometimes derivable from it in the case of private estates; and as powerful Kings seldom scruple, on very inadequate grounds, to make a cruel sport of human kind in war, his bold spirit would not probably think of seeking, in that slender connection, a handle for hostilities, for which, if he can inconsistently be supposed to have been meditating immediately to commence them, his good sense would teach him, that specious pretexts, sufficiently according with fashion, might always be invented, besides that real force would effectually release him from an indispensable obligation of finding even a plausible apology. The definitive judgement, after much anxious consultation ‡, pronounced by him in favour of Baliol, was in itself exactly consonant to law: The regal dignity

* Rymer, II. 553. &c.

† I must except my worthy friend, the deceased George Ridpath, whom, after a full investigation, strict impartiality engaged to do more justice to that injured monarch. See p. 184. of his *Border-History*, an accurate and curious, as well as learned and laborious work.

‡ Rymer, II. 589.

nity of Scotland, an incorporeal object, was adjudged by him, agreeably to its own nature, as well as to a custom invariably observed in that and in other states, to be an indivisible inheritance*: And as, in order to ensure the execution of his sentence, most of the principal fortresses of the country, and even the country itself, had been delivered into his custody †, it would plainly have been far easier for Edward to have then retained possession of the defenceless and divided kingdom, than to effect a conquest of it, after his troops had been withdrawn to a distant quarter, and a King, the rightful heir of the royal race, had been assigned, by prejudices and by authority, to unite the force, and to direct the operations, of the enemy. Nevertheless, the castles, which had been put in his hands, were faithfully surrendered by his order: Scotland was evacuated by his soldiers: A contest, from its object so interesting to those engaged in it, was terminated rightfully without the effusion of any blood: Seisin of the kingdom was immediately given to the Prince, whom his decree had declared entitled to inherit it ‡: And Baliol was peaceably admitted into full possession of his dominions. His spirit, however, or his imbecillity, having soon kindled a war between the nations, Edward in a few years over-ran the north, and John was driven from the throne. It was during this critical season, when his deserted country was subjected to a foreign yoke, and the English government, from the rigour and the rapacity of the officers who administered it, had become universally odious, that Sir William Wallace

* Rymer, II. 587. 588. 589.

† Rymer, II. 529. 531. 554.

‡ Rymer, II. 590. 591. 600. 601. 602.

lace *, the patriotic and renowned Regent of Scotland, atchieved those magnificent exploits, whose heroic glory has thrown a mighty lustre around his name, and which cause his memory still to be adored with an undiminished and fond admiration among the Scots. After the battle of Falkirk, the Knight of Ellersly is affirmed by Blair, his constant attendant in arms, and by all the Scottish historians of any credit, to have held with young Bruce, across the waters of the Carron, a conference, which forms one of the most beautiful passages in the whole history of Scotland; and his discourse, conveying sentiments well adapted to catch a mind full of ambition and inclined to patriotism, is reported to have contributed greatly towards determining that noble youth to seize the favourable opportunity, afforded him by the abdication and the pusillanimity of Baliol, of finally abandoning the interest of England, and of asserting his own pretensions to the crown †. After a long and distracted interregnum, and a great variety of fortune, the Earl of Carrick was at last placed on the Scottish throne. But his possession, violating the rules of succession that from custom had acquired an appearance of solidity, was not undisturbed. Hereditary lineage, which, in all competitions between any individuals whose pretensions are nearly equal in other respects, has great influence both in directing the imagination and in determining the affections of mankind, bestowed a preferable right on another family : Edward I. had effected an entire conquest of all Scotland : Mighty efforts were made by them, by se-
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* Fordun, XI. 28.—Boet. XIII.—Major, IV. 14.—Buchanan, VIII. 18.—Leslie, VI.—Ridpath, p. 203.

† Relations Arn. Blair.—Life of Wallace, XI. 4.—Fordun, XI. 34.—Boet. XIV.—Major, IV. 14.—Buchanan, VIII. 23.—Leslie, VI.—Rymer, II. 718.

cret conspiracies and by open force, to recover for themselves, and to deprive him, of that kingdom : And the natural partiality discovered towards each other by Baliol, and by the English, whom similitude of passions, and an union of interests, impelled to look with enmity on a man who with-held from both the immediate object of their desires, served considerably to confirm his subjects in their attachment to Bruce. Besides supporting his cause with arms in the field, the community of Scotland addressed to the Pope an earnest supplication in his favour. In this letter *, no less admirable for the expressive energy of its style, than the brave spirit displayed in it, they remind his Holiness of the remote origin and high antiquity of the Scottish nation : Boast that, after having passed from the Greater Scythia, by the Tyrrhenian Sea and the Pillars of Hercules, into Spain, and after having sojourned many ages among the fiercest barbarians of that region, they had at last, a thousand and two hundred years after the transit of the Israelites, acquired in the farthest extremity of the west a seat in the land still occupied by them : Celebrate the peculiar and early favour manifested towards them, by Jesus Christ, in vouchsafing to establish them in his holy faith, by his first Apostle, Andrew, brother-german of St Peter : Affirm, that they had already been governed by one hundred and thirteen Kings †, all sprung in an uninterrupted line from the Royal blood of their native princes : Mention the independence which they had hitherto enjoyed from the dominion of foreigners : Describe the treacherous invasion :

* Fordun, XII. 2. 3. — Crawford's Officers of State, Appendix, No 5. — Anderson's Diplomata, No 50. 51.

† Parl. 1661, c. 5. — Parl. 1685, c. 2.

vation and the cruel desolation made in their country by the English arms: Take notice, that, by unanimous consent, they had chosen for their sovereign their deliverer, Robert Bruce, who, after many perils and much toil, had rescued his forsaken country from the extreme misery brought upon it by the iron hand and desolating sword of Edward: Assert that they fight not for riches, for honour, or for glory, but only for liberty; a possession with which, they believe, no good man ever parts but with life, and which they declare it to be their fixed purpose, as long as a hundred of them should remain alive, to maintain inviolate both against him and against England: Beseech the Holy Father, by an immediate interposition of his apostolical authority, to admonish Edward, that, contented with those ample dominions which, in former times, had been deemed sufficient for more than seven Kings, he would suffer the Scots to dwell in peace in that miserable corner beyond which, they say, no habitations are found: And conclude with intimating, that if his Holiness, lending a credulous ear to the reports of their enemies, should not interpose in their behalf, but persist in favouring the English, the laceration of bodies, the loss of lives, the perdition of souls, and all the other calamities which might ensue from a rupture between the two nations, would assuredly be imputed to him by the Most High.

This remonstrance was not entirely destitute of success. An exhortatory mandate *, full of just sentiments on war, was soon issued to the English monarch by John XXII. who at that time governed the Church of Rome, and Robert Bruce died in full possession of the Scottish Crown. But the expelled

* Rymer, III. 846.

pelled family was no sooner delivered from the awe in which they had been kept by the vigour and the intrepidity of his mind, than fresh attempts were begun by them to recover that throne to which lineal descent from its ancient possessors gave them a hereditary claim ; and Edward Baliol *, after having surprised, and, in a great battle fought at Dupplin, put to rout the Earl of Marre, on whom the regency had been conferred by the states of the kingdom during the minority of David II. was at last crowned at Scoon, a small village at which that magnificent ceremony had usually been performed. During the short time the Scottish sceptre remained in his hands, this prince neglected not to employ his regal power, both in bestowing rewards on those who had supported his pretensions to it, and in inflicting proscription on such as had opposed them. Malise Earl of Strathern had not only addressed the Roman Pontiff in behalf of Bruce, but resisted the forces of Edward ; and, on the restoration, having been forfeited for his treasons, lost both the dignity and the estate of Strathern. That Earldom was granted by the King to John de Warrenne, Earl of Surrey, who had assisted in restoring him, and who was thenceforth stiled Earl of Strathern, as well as of Surrey †.

Strathern.

This acquisition was not long retained by Warrenne. The measures to which Baliol, in consequence of the engagements contracted by him, was obliged to condescend, particularly in ceding a large part of his dominions, and in surrendering the feudal sovereignty of the remainder to the King of England, were

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* Rymer, IV. 536.

† Rymer, II. 726. : IV. 595. 616. — Dugdale, I. 80. 81.

no less unpopular and mean, than the memory of Robert was dear and respected, in Scotland. David, after having been necessitated to retire for safety to France, at last recovered entire possession of his father's kingdom; and in 1343 bestowed the Earldom of Strathern, which had again been forfeited, on Sir Maurice Murray, nephew and heir of Malise, who was then dead, and on the heirs-male of his body, in their default to the Crown*.

Maurice Murray Earl of Strathern was killed in 1346 at the battle of Durham, and not having left issue, the Earldom, in terms of the grant made in his favour, returned by succession to the King. The honour was thereby extinguished, till David II. gave the estate to his nephew Robert, the Stewart of Scotland, by whom the title was accordingly borne. In authentic deeds still extant, granted both by himself and by others, the Stewart is termed Earl of Strathern†.

This prince, the first of the House of Stewart who ascended the Scottish throne, granted the Earldom of Strathern, which by his accession had merged in the Crown, to his son David Stewart‡. In consequence, the dignity, as well as the estate, passed to David; and it is attested, by all history, that both were transmitted by him to his daughter Eupheme, Countess Palatine of Strathern.

Sir.

* Dalrymple's Collections, p. 376. 377. — Charter cited in Ad. Case, ch. 5. p. 55.

† Dalrymple's Collections, p. 376. — Fordun, XIV. 27. — Hawthornden, p. 45.

‡ Mackenzie's Cond. p. 14. — Lovat's Answers, p. 25. — Buchanan, X. 46. — Hawthornden, p. 34. — Rymer, VII. 1. 345.

Sir Patrick Graham, her husband, was also dignified, on his marriage, with a corresponding title*. Their son Malise Graham†, during his captivity, was divested of the Earldom by James I. ‡ who, instead of it, conferred on him the Earldom of Menteith. The story is sufficiently noted. In consequence, Malise ceased to be Earl of Strathern, and was stiled Earl of Menteith; a title which continued long in his family. The Earldom of Strathern, in 1427, was granted by James to his uncle Walter Stewart Earl of Athole||; and the honours were borne by Walter also. On his forfeiture § the Earldom returned to the Crown, and the dignity was extinguished; but both were afterwards revived in the person of John Stewart, on whom the estate was bestowed by his brother James II.

The wife of Lord Crichton, a grandson of the Chancellor, was a lady of exquisite beauty; and James III. regardless of her high quality, made a full use of the advantage afforded by his elevated station**, to obtain a triumph over her virtue. Crichton was

Crichton.

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* Mackenzie's Cat. p. 12. Cond. p. 14. and Inform. p. 12. 18. — Lovat's Answers, p. 25. and Remarks, p. 10. — Rymer, VIII. 544.

† Rymer, X. 307. 309.

‡ Buchanan, X. 46. 48. — Hawthornden, p. 34.

|| Royal Charter, B. 3. No 48. — Sup. Cafe, p. 20. — Ad. Cafe, ch. 5. p. 54. — Brief, p. 106.

§ P. 61. above.

** The Scottish Kings, even without a positive statute, perhaps were always possessed of something resembling that singular privilege, which Ewen III. is reported by their historians to have acquired indiscriminately to all superior lords by an express law.

Royalty

little disposed to digest, with tameness, a gross injury inflicted in a sensible part, in which a proud temper or a tender heart is both severely and easily vulnerable ; and his enraged spirit emboldened him to avail himself of those recommendations which enabled him to make reprisals on a favourite relation of his Sovereign. The King, by a marriage, endeavoured to cover the dishonour of his beloved sister, but, amidst all his dissimulation, could not forget the indignity which, in her person, had been done to Majesty ; and, on pretence that Crichton had entered into a conspiracy to place the Duke of Albany on the throne, he was afterwards tried, and at a long interval condemned by Parliament*. His lordship of Crichton was seized by the Crown : The barony of Fren-draught, which belonged to his wife, was all the estate that was reserved to his son : The title became extinct.

Marre.

The preceding instances illustrate our general principle, as well as the particular position advanced in this section : But proofs of both still stronger, if possible, than the former, occur in the family of Marre.

Royalty is commonly irresistible ; but from the very facility of victory, and the indifference produced by satiety, would also be excluded, by that barbarous custom, from the agitation, the solicitude, and the sentiments, which, amidst courtship, uncertainty, and difficulties, adding force and vivacity to the predominant passion, compose a principal part of the refined enjoyments derivable from the elegant affection of love : And a more accurate discernment and more delicate taste, as well as greater probity and stricter justice, were discovered by Malcolm Canmore, who, long before the accession of James III. had abrogated that tyrannical usage.

* Buchanan, XII. 50. 51. — Hawthornden, p. 139. 95. — Parl. 1475, c. 79. — Parl. 1489, c. 106.

Marre *: Alexander Stewart, that gallant adventurer, who espoused Isabella Douglas Countess of Marre †, incapable of relishing the languid pleasures of tranquillity, conducted a chosen band of auxiliary troops to share in the toils and the glory of a war then waging in the Netherlands; and having on that expedition wedded Jacqueline only child of the Earl of Holland, his lofty ambition, aspiring at the sovereignty of those Provinces, stimulated him to assert his claim, or rather to gratify his resentment, in a predonious war on that element on which, even in those days, the Hollanders were vulnerable ‡. A man, so haughty or so turbulent, would not readily be contented with a right, determinable or precarious, which, under settlements made by Isabella, he had to possess the Earldom for life. The estate had once been settled on his heirs ||, as well as on himself; but this settlement seems afterwards to have been altered with his own consent §; yet holding himself still to retain the property, he took upon him to surrender the fief to the King; and on his own resignation, got from James I. a charter, devising it, after his death, to his natural son Sir Thomas Stewart, and the heirs-male of Sir Thomas's body, in their default to return to the crown **. In 1438, after the

* P. 70. above.

† See p. 89. 90. above.

‡ Fordun, XVI. 25. — Boet. XVII. — Major, VI. 13. — Buchanan, X. 43. 44.

|| Charter, 12th August 1404, B. 7. No 257.

§ Instrument, 19th September 1404. — Charter, 9th December 1404. — Charter, 21st January 1404-5.

** Charter, 28th May 1426. B. 2. No. 8.

the death both of Alexander and of Thomas without issue, Robert Erskine Lord Erskine was found, by an inquest, lawful heir of Isabella, the last owner, by whose will the Earldom stood ultimately devised to her own heirs, and having obtained investiture in the estate, bore the title for some years. But, on pretext of the reversion which, in default of heirs of the body of Thomas Stewart, had been stipulated to the crown in the charter of James I. and of the bastardy both of Alexander and of Thomas, the lands were seized by James II. *. In 1457, Lord Erskine's right was set aside on an action at law, and an affize of error, held in presence of the Sovereign, who stooped to attending them in person, found that the Earldom had devolved to the King. In consequence, Lord Erskine and his family, the rightful heirs, being excluded from the property, did not carry the honours †, and the Earldom was bestowed on Lord John Stewart, a son of James II. who bore the title annexed to it. Against this Prince, amidst his innocent amusements and the gentlest manners, fearful suspicions were artfully instilled, by cunning men, into the feeble mind of James III.; and John Earl of Marre, having been insidiously invited to Edinburgh, was, soon after, murdered, perhaps without the direct participation of his royal brother ‡. The noble estate was then granted by James to his favourite mason, and Robert Cochrane became Earl of Marre. Buchanan's expressions here are remarkable. 'The King,' says he, 'after the death of his
 ' brother,

* Boet. XVII. — Major, VI. 13. — Buchanan, X. 44. — Hawthornden, p. 34.

† Keith, p. 216. 222. 226. 297. 305. 520. 525.

‡ Major, VI. 18. — Buchanan, XII. 17. 38. — Leslie, VIII. in 1460 and 1479. — Pitfcottie, p. 135. 136. 137. — Hawthornden, p. 101. 125. — Parl. 1460, c. 2.

‘ brother, either granted that country in property to Cochrane, or gave it to be managed by him ; and the high dignity of Earl of Marre was a principal source of the great envy which arose on his elevation *.’ Cochrane’s fate is well known. After his murder the Earldom was probably conferred on Lord John Stewart, a younger son of James III. by whom also the honours were possessed † ; and, after his death, seems to have remained with the crown till, in 1562, it was bestowed by Queen Mary on her brother the Prior of St Andrews ‡. Lord James Stewart, who was thence styled Earl of Marre ||, a powerful as well as able man, might, perhaps, have retained both the estate and the dignity, as the long possession which had then been held by the crown, under a title seemingly inexceptionable, must have given a great firmness to its apparent right. But the integrity of his morals is not less conspicuous than the solidity of his understanding and the extent of his parts ; and on the death of Alexander Stewart, the Earldom ought to have descended to the family of Erskine, the heirs general of Isabella. In 1555, after a desperate struggle, their right had been again established by the verdict of a jury, and James, probably moved by the near relation in which his

* Cochranus maxime invidiosus fuit titulus comitatus Marriae ; quam regionem Rex, extincto minore fratre, vel ei donaverat, vel regendam commiserat. Buchanan, XII. 46. — Hawthornden’s expressions are equally remarkable ; “ Robert Cochrane,” says he, “ who, of a surveyor of works, was made Earl of Marre, or, as some mitigate that title, intromitter with and taker up of the rents of that Earldom,” p. 131, &c.

† Hawthornden, p. 157. — Stewart’s History of the Stewarts, p. 79. — Crawford, p. 31. — Parl. 1489, c. 25.

‡ P. 62. above.

|| Keith, 215. 216. 222. 224. 226.

his mother stood to that family *, as well as disdaining to hold an estate which, in justice, belonged to another, surrendered the Earldom to the Queen, by whom a charter was executed, granting it to John Erskine Lord Erskine. The Prior was no sooner divested of the lands than he ceased † to carry the honours of Marre. That title went to Lord Erskine; but not till, in June 1565, the Earldom had been formally made over to him ‡. This nobleman, however, was not created Earl of Marre: He got no more than the dignified fief; but the dignity, an appendant of it, was in consequence vested in his person, and continued in his family, till John, the last Earl, was attainted of treason for accession to the rebellion raised by him in 1715 ||. Hence, perhaps, it was that the Erskines, Earls of Marre, enjoyed not the precedence corresponding to the high antiquity of the dignity which had devolved to them.

Lennox.

The Earldom of Lennox, on the death of the Regent, devolved, by inheritance, to his grandson James VI. and, in 1572, was granted by him, during his minority, to his grand-uncle Charles Stewart, his heirs and assigns, on whose death it descended, not to his only child Arabella Stewart, the Lady whom Sir Walter

* His mother Margaret Erskine was a sister of Lord Erskine. Crawford's History, p. 37.

† Keith, 226. 520. 525.

‡ Keith, 277. 283. 288. 297. 305. 309. 379. 520. 525. — Appendix, 106. 107. 108. 109. 110. — Parl. 1563, c. 1. — Parl. 1567, c. 1.

|| Mackenzie's Cat. p. 10.; and his Cond. p. 11. — Lovat's Answers, p. 16. — Sup. Cafe, p. 31. — Add. Cafe, ch. 5. p. 42.

Walter Raleigh was unjustly condemned on an unestablished charge for having conspired to place on the throne, but was revoked by the crown, and conferred, first, on the King's uncle Robert bishop of Caithness, then on his cousin Esme Lord d'Aubigné, who enjoyed both the dignity and the estate of Earl of Lennox till they were advanced, in 1581, to a Dukedom*.

S E C T. IX.

Were disposible by Will.

HONOURS, annexed to lands, and transferable with them. By sale, could not be entailed fiefs, unalterably limited to a determinate series of heirs, each indefeasibly entitled, in course of succession, to inherit them, but must have been fees simple, and were, in all probability, devisable by will; a proposition, indeed, which amounts to no more than asserting that a proprietor might make a settlement of his estate, as noble fiefs were not, less than other lands, disposible in that manner.

William Sinclair, Earl of Caithness, and chancellor of Scotland, was twice married. His first wife was Margaret Douglas, a daughter of that mighty warrior Archibald the fourth Earl of

Caithness.

P

Douglas.

* Lovat's Ad. Cond. p. 20.

Douglas *. By this Lady he had a son William, whose heir Henry Lord Sinclair, in consequence of the primogeniture of his father, was declared by parliament, in an act † remarkable for that singular interposition, to be chief of his blood. His second wife Marjory Sutherland, a daughter of Alexander Sutherland of Dunbeath, bore him, at least, two sons, of whom Oliver, the eldest, having got from his father the barony of Roslyn, &c. built there that romantic castle which has afforded matter for one of those songs, that, on account of the plaintive melody of their music, and of the rare simplicity of their sentiments, are greatly admired in Scotland. Out of partiality to her second son, also named William, the Earldom was settled on him by his father, who, having resigned it to the crown, took a new charter in favour of William and his heirs general ‡. William, the third son of his father, was not created Earl of Caithness by any patent; yet the dignity, as well as the estate, was enjoyed by him under that settlement, which is no more than a common conveyance of the lands: The title is not even mentioned in it: And both descended to his heirs. George, his grandson, purposing that they should be limited to males, altered the destination under which they had hitherto

* The Earl of Douglas, who, after, for important services rendered to Charles VII. he had been created Duke of Touraine and Marischal of France, was killed at the battle of Verneuil, in which his valour was highly distinguished. Boet. XVI.—Major, VI. 9.—Buchanan, X. 23. seq.—Leslie, VII. 260.—Hawthornden, p. 34.—Hume, ch. 20.

† Records of Parl. 26th January 1488-9. B. 4. p. 113.

‡ Charter, 7th December 1476; (B. 7. No 393.) printed in Appendix to the case of the Earl of Caithness.

hitherto stood devised, and on his own deed, resigned the Earldom into the hands of James V. by whom a new grant was made to John Sinclair, (George's presumptive heir) and the heirs-male of his body, by whom both honours and lands were accordingly inherited*.

Lady Jane Beaufort, a grand-daughter of Edward III. was peculiarly distinguished by that refined sensibility, which, rendering the heart easily susceptible of the tender passion, causes all other enjoyments, compared with its elegant delights, to seem faint and empty. After the assassination of James I. the Queen was not ashamed to degrade her high rank, by marrying Sir James Stewart, a man much inferior to her in degree, of whom she was passionately fond †; and during the time her affection lasted, beside other children, she bore to the black knight of Lorn, a son named James Stewart, on whom his nephew James III. bestowed the Earldom of Buchan. In a royal charter, granted in 1478, the Earldom was limited to James and the heirs male of his body, in their default to return to the crown; and under this limitation, by which the fief was rendered masculine, it descended to his grandson John Stewart, the third Earl of that race, who purposing to alter the destination, executed a settlement, devising the Earldom to himself for life, and to his son John, and the heirs general of his body in fee. On this deed the Earldom was surrendered to the crown, and, on the resignation, a new charter was

Buchan.

P 2

obtained,

* Ad. Case, ch. 6. p. 110.—Crawford's Officers of State, p. 34.—Case of Caithness above.

† Major, VI. 15.

obtained, in 1547, limiting the descent in the terms appointed by the Earl. In a few days, John the son was killed at the battle of Pinky, in the lifetime of his father, before he had been infeoffed under the charter; upon which his only child Christian Stewart was regularly returned, on an inquisition, to be his heir, and a royal precept was issued for giving her seisin upon it. This Lady, in the character of fiar of the Earldom of Buchan, granted charters, renewing their investitures, to vassals who held their lands of the family: And, on her grandfather's death, obtaining full possession of the dignity as well as of the estate, she was universally styled Countess of Buchan. The heirs-male, descended of her grandfather and of the original grantee, never made any pretensions to either*.

Morton.

James, the third Earl of Morton, who married a bastard † of James IV. had no male issue: But he had three daughters; first, Margaret, who married the Duke of Chatelherault, Regent of Scotland, and heir to the crown, during the minority of Queen Mary; second, Beatrix, who married Robert Lord Maxwell; third, Elizabeth, who married James Douglas, second son of George Douglas, a brother of Archibald Earl of Angus. His Lordship, in that situation, made a deed, by which his estate was devised to his youngest daughter Elizabeth, and her husband James Douglas, and the heirs-male of their bodies. Under this settlement,

* P. 90. 93. above. — Lovat's Answers to Mackenzie's Cond. p. 8. — Ad. Case, ch. 5. p. 60.

† Catherine, daughter of Mary Boyd.

ment, on which a charter was taken from the Queen, James Douglas, on the Earl's death, succeeded to the title as well as to the Earldom of Morton. He is that Morton who was regent during the minority of James VI. and who makes a considerable figure in all the transactions of those days. The conveyance executed by his ancestor the third Earl, instead of being impeached by either of the elder daughters, was ratified both by the Duke, by the Duchess, and by their eldest son *.

In many cases, in which noble fiefs, in default of the heirs specified in grants of them, had been provided to return to the crown, the limitations did not take effect, and the dignities, as well as the estates, were prevented from devolving to Majesty, or from becoming extinct, even on the failure of the heirs to whom they had originally been limited. A devise, made in favour of the King, is equally effectual, but it is also alterable, as much as a settlement executed in favour of a subject.

SECT.

* Stewart's History of the Stewarts, p. 84. — Crawford's history of them, p. 33. — Ad. Cafe, ch. 4. p. 46. — Crawford's Officers of State, p. 94. — See note (I.) at the end of the volume.

S E C T. X.

Difficulties explained.

MEN, who, contented with a superficial view of ancient objects, have not obtained an exact idea of the essential differences by which Scottish Peerages were successively discriminated from themselves in different ages, not being delivered from the confounding impression excited by their present appearance, will be surpris'd, perhaps alarmed, to hear, that noble dignities were of old devisable by private persons; and we find a total scepticism entertained, and even sanctified by authority *, about the operation of those settlements. But the Scottish records must be wholly obliterated before the connexion, which subsisted in former times between fiefs and honours, can reasonably be denied: And your Lordship's accuracy will attentively mark both the nature of the things which are here asserted to have been devisable, and the limitations which qualify my assertion concerning them. Ground, a substance immediately productive of fruits, of wealth, and of independence, was much more valuable than empty titles: Even jurisdictions, which give power, and importance, and influence, were possessions more solid: But their owners were allowed to dispose

* Judgement of the House of Lords, 21st March 1771, in the case of the Peerage of Sutherland.

dispose of both the former, and of course could hardly be disabled in ancient times to make settlements of the latter.

Territorial honours, it has been observed, were merely names bestowed on lands, to which analogous appellations were assumed by the proprietors, on purpose to express, in clear characters, that they were owners of estates raised to the degrees belonging to them. Private men, therefore, at executing settlements, or making conveyances, did not either confer Peerages, or pretend to that lofty prerogative: They aspired not even at disposing of honours, considered abstractedly by themselves, or taken separately from lands: They did no more than dispose of grounds, which had been deemed sufficient for sustaining the rank of Nobility, and which were possessed of the denomination assigned to them by the Crown.

To these their dignities, no less than their jurisdictions, were annexed, and proprietors could not but possess a power over the honours united to their lands, as well as over any other appendants of them. A man, whose interest in a thing is not limited, is entitled to dispose of every component part of his property.

In this article one species of estate was not distinguished from any other. A man was unquestionably entitled both to settle and to alienate lands erected into a Lordship, an Earldom, a Marquissate, and a Dukedom. No disability was imposed by the rank to which his property was elevated; and in old times baronies, and even simple freeholds, conferred, no less than estates raised to higher orders, inelective seats in Parliament.

Feudal

Feudal honours could not be granted by any other than the Sovereign. A parcel of lands could be erected even into a Barony only by the King; and fiefs, held immediately of the Crown, were alone susceptible of that elevation. Even Royalty cannot exercise power over things which belong not to itself, but to others. Those holden of subjects could not be nobilitated: and territorial dignities were not transmissible, either by the original grantees or by their heirs, by subaltern conveyances even of the whole dignified estate to subordinate vassals. An integral alienation, by which the owner was totally divested, at least of the superiority in favour of a new Lord holding immediately of his Majesty, was alone capable of producing that effect*.

The King, the sole arbiter as well as alone fountain of honour, it must be supposed, would not in ancient times confer nobility on estates, more than at present Peerages are granted to persons improper to be ennobled; and as the dignity was annexed to the fief, and of course a conveyance of the lands with which it was incorporated could alone effect an alteration on the destination of the title, if a person, different from the lineal heir, acquired either by purchase or by settlement a right to the honours, this acquisition of a thing, which formed part of the whole purchased by him, could not but be entirely agreeable to the royal intention, declared by having selected the lands for the immediate object of regal favour.

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* Erskine, B. 2. t. 3. § 46. — Stair, B. 2. t. 3. § 45. — Macdouall, B. 2. t. 3. § 86. — Craig, L. 1. d. 10. § 16. 21. : L. 1. d. 12. § 16. 26.

In Scotland, in which the feudal system was long cherished in all its rigour, most of the lands belonging to tenants of the crown were held by military tenure. Other tenures were indeed attempted to be brought into fashion; but, in a country, in which mercenary legions were scarcely known or seldom employed, those endeavours were neither early nor effectual. In ancient days, regular troops were not kept on foot there: Private men, exposed to attacks, and studious of safety, were unwilling to part with obligations, which afforded them a tolerable security against unlawful invasions of their persons or of their property: And the feudal militia was the only military force, for which a provision was established by law, or which the sovereign could bring into the field. Lands, not proved to be held on other terms, were presumed, even in 1746, to be held in that manner, and it might be authenticated by record, that in the fifteenth century most of the great estates in Scotland remained military fiefs. The service for which these fees were granted, demanded, that the benefice or pay, which was given to the feudatory for performing it, and by which he was enabled to discharge his duty, should not pass from him. Hence a vassal, on alienating even a half of his lands without the consent of his lord, forfeited them to the superior of whom they were held*. This condition, implied in military tenure, was a restriction abundantly severe on the disposal of property, but, if considered in relation to the present business, probably will not appear an impolitic regulation. The crown, being thereby possessed of a check equivalent to a negative on a-

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lienation,

* Craig, L. 3. d. 3. § 8. 13.—Mackenzie, B. 2. t. 5.—Stair, B. 2. t. 11. § 10. 17.—Macdouall, B. 2. t. 11. § 31.—Erskine, B. 2. t. 5. t. 10. 14.—Parl. 1587, c. 113.

alienation, might prevent both titles and estates from going to persons unfit to be ennobled ; and possessions, adequate to maintain honours, were secured to those who should enjoy them *.

Even in cases, in which lands were held by a tenure different from ward, vassals were frequently restrained, by obligations purposely contracted to disable them, from alienating their fiefs without the consent of their lords.

Feudal property was also limited by another restriction, which extended to every species of tenure, to wit, that a superior was not bound to accept for his vassal, or to grant investiture to any other than the heir called by descent to inherit the fief in course of the destination made in the original grant bestowing it †. The King, indeed, the Liege Lord of all his people, who, in matters of right, ought never to shew a partiality to any of them, seldom availed himself of the power of rejection vested in him. The faculty however might still be exercised at pleasure by the crown, as well as by other superiors.

Those, therefore, who are anxious about preserving the purity of the peerage, need not be alarmed at finding a power, seemingly no less anomalous in itself, than adverse to the ideas rightly entertained at present, asserted to have once been lodged in subjects. The accumulated circumstances, which have been mentioned, establish, that honours were anciently annexed to lands, and

* Parl. 1640, c. 20.—Parl. 1704, c. 3.—6th *Annæ*, c. 1.

† Stair, B. 2. t. 3. § 5.—Macdouall, B. 2. t. 4. § 11. : B. 3. t. 10. § 12. 14. 15.—Erskine, B. 2. t. 7. § 5. 6.—Craig, L. 2. d. 4. § 17. : d. 6. § 25. : L. 3. d. 1. § 13. 14.—Parl. 1469, c. 44.—Parl. 1587, c. 113.—2^o *mo* G. II. c. 50.

and that the former, inherent in the latter, were transferable, as well as descendible with them : But they serve also to prove, that, in ancient times, seats in parliament depended not on nobility, but on freeholds, and that before 1587 the dignities conferred on fiefs, and assumed from them, were merely titles, which implied degree and precedence or place only : And the various restraints, imposed by the feudal law on alienation, were sufficient to prevent either honorary appellations or noble fiefs from going to persons, different from the heirs called by blood to inherit them, without the approbation and consent and even intervention of the crown.

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BOOK

B O O K III.

Personal Honours.

MY LORD,

IN corrupt times, in which government either possesses not the good sense to adopt patriotic plans, or, from the pride and the meanness of those who administer it, is obstinately determined to pursue pernicious measures, a base prostitution of parts, artfully disguised under occasional professions of disinterested principles, a dexterous servility of spirit, cunningly attempered with an imposing affectation of an ungovernable boldness, and even a frivolous talkativeness, duly restrained by constant habits of an attentive politeness, conduct to preferment, much oftener than a worthy exertion of talents, real greatness of mind, or substantial qualities. A man, however, in remounting to the remote causes of things, may be allowed, without being charged with entire ignorance of the world, to suppose that personal honours owed their first origin to personal excellencies. Superior merit, being something vast and uncommon and luminous, compels notice, and must be respected in every region ; but from the different states in which mankind are placed in different climates, and from the remarkable diversities put by nature, or produced by education, among the faculties and the inclinations of individuals, presents itself also under a great variety of different aspects.

One species of excellency, more ancient and more universal, as well as more showy and more commanding, perhaps than any other, is that displayed in those bloody conflicts termed wars, which unruly passions, supreme folly, or disorder of fancy, seem much more frequently than lawful defence, rational views, or justness of understanding, to have excited in all ages, both between enlightened and between ignorant nations. Hardy feats of arms, in a brave contempt of death, indicating a mighty elevation of soul, throw, by their rare brilliancy, an effulgent glory around those magnanimous spirits who perform them; and a dazzling reputation atchieved by martial deeds, which in perilous times are more immediately conducive, than most other actions, to common weal, can scarcely be supposed, among any fighting people, however uncivilized, not to come early to be signalized by pompous and observable ensigns. Among the Romans, extraordinary valour was rewarded with arms, with banners, and even with coronets; and generals who had gained victories, rendered uncommonly splendid by great carnage, were sometimes saluted by their soldiers with the flattering title of Emperor *. In a nation almost constantly engaged, like Scotland, either in domestic broils within itself, or in public contests with foreign enemies, gallant exploits performed in the field must soon have commanded similar expressions of popular admiration. Accordingly, in old records, we read of many valiant men; Graham, Randolph, Murray, Douglas; distinguished by the appellation of Knight, which probably had been bestowed upon them without much formality by their companions in arms, or perhaps had been presumptuously assumed by themselves without even that ceremony.

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* Tacit. Annal. iii. 74.—Velleius Paterculus, ii.

It is agreeable to a natural congruity, that the right to honours, granted out of respect for qualities which are personal, be confined to the individuals whose superiority is proposed to be marked by them. As heroic courage is not an inheritable virtue, Knighthood, an order originally martial, was never united to lands, and does not yet pass to heirs; and the only distinctions, entitled to be denominated personal honours, which appear to have been anciently known or valued in Scotland, seem to be military.

The rank held by a father, from the propinquity of their relation, from the frequency of their contiguity, and from their participation of his fortune, always communicates itself in some degree to his children: People descend not without reluctance from that which has once been sustained by them: And parents are generally solicitous, that advantages enjoyed by themselves be shared by their posterity. Hence honours could not long continue to resemble in transitoriness the qualities which had first given them existence. Men, conscious of desert, or swollen with vanity, would insist that their families, as well as themselves, should be aggrandized.

S E C T. I.

In Countries, governed, like Scotland, by the Feudal Law, Nobility descendible to Heirs, would not soon be disannexed from Fiefs.

OPULENCE, which signifies a power of acquiring things grateful to sense and to passion, exciting a present conception both
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of those objects and of the pleasures derivable from them, diffuses an assured complacency over the spirits of those blessed with it : And external advantages, which, on directing our eyes towards such as are disabled by poverty to command like grandeur or conveniencies, we behold ourselves to possess above them, presenting to the mind a pleasant image of our condition in life, are apt, in all cases, to beget in our breasts a satisfaction contemptuous of others, as well as vain of self*.

In populous, indeed in most regions, landed property, on account of the real comforts and ingenuous pleasures derivable from it, as well as its durableness and its solidity, is justly held in a superior estimation among sensible people. The amount of fortunes which consist in money and in moveables, exposed to accidents and liable to perish, can seldom be ascertained with exactness. There even fair appearances are often deceitful ; and a perfect reliance cannot always be had on their reality and firmness : But grounds and immoveables are solid and lasting possessions ; and landed estates, visible striking durable objects, imply, more clearly than any other, a permanent ability of purchasing enjoyments agreeable to nature and to vanity. Hence in every soil, in which land forms either the only valuable or the principal species of property, a conceit, arrogant as well as lofty, must be almost mechanically generated in its owners †.

The importance, naturally belonging to land, may sometimes be increased by circumstances, and in particular may be affected by such as tend either to diminish the number of those possessed
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* Treatise of Human Nature, V. 2. p. 1. § 10.

† Ibid, V. 2. p. 1. § 5. 9. 10.

of it, or to augment the size of their estates. In nations, therefore, in which manufactures and agriculture are in a low, perhaps a depressed state, an extraordinary dignity must be reflected upon it. Among them, affluence can rarely, if ever, be acquired in business; and the proprietors of ground, the only citizens who can be deemed rich men, by the great elevation to which they are exalted above every order around them, must be raised aloft almost out of the reach of comparison or of envy.

In countries governed by the feudal law, the arrogance, inspired by property, must thence be heightened to a degree peculiarly high. There, in consequence of the rule, by which, in succession, a preference is given to males above females, and inheritances are not suffered to be broken in pieces among them, the favourites, termed heirs, to whom fortunes are transmitted without toil, and even preserved with anxiety by legislature, remarking the superior situation in which they are placed above persons, who, though equal in extraction, are yet kept in a humiliating disparity beneath them, cannot easily avoid being strongly impressed with a superlative idea of their own importance.

A vanity is very generally found even in the acquaintance of persons conspicuous for wealth, for equipage, for dress, or for titles; and people, who can scarcely be termed silly, are sometimes ashamed to be seen in contact with any whose pockets are suspected to be empty of money. It must, therefore, give us a sensible satisfaction, if our near relations, with whom we are commonly obliged to maintain a close intercourse, be elevated by fortune; and our remote ancestors, no less than our immediate parents, are productive causes of that vain sentiment. Wise men,
conscious

conscious of the superior value of intrinsic merit, endeavour indeed, as much as possible, to repress in their breasts such foolish prejudices. Nevertheless, every one plumes himself more or less on the riches and the greatness of his forefathers; and the strong prepossession, almost universally entertained in favour of antiquity of descent, must be owned to be in some sort a mechanical effect of the agreeable phantasms * which give rise to it.

A long train of honourable personages, presented to view in a regular succession, such as Shakespeare's Pageant or a military procession, is in itself a splendid object, which can hardly be surveyed without delight. But, suppose that this vast multitude is assembled solely, as at a coronation or in a triumph, on account of a single person, towards whom their own regards, as well as the eyes of all who flock to see it, are principally directed; their elevated rank, their gorgeous apparel, their grand equipages, their immense number, infusing the idea of their magnificence into that formed concerning him, must contribute greatly towards his aggrandizement in the imagination of beholders. A long line of ancestors, eminent for virtue, for abilities, for power, or for wealth, bears a considerable resemblance to that magnificent spectacle, and is contemplated with a similar satisfaction. In the one case, the members who compose it are displayed to fight: In the other, they are exhibited in vision to fancy: But in both, especially in the latter, a lustre is thrown by reflection from them around him towards whom its termination stretches, and we are filled with an impression as if those mighty personages, of whom a memory only is now left upon earth, had been brought into
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* Treatise of Human Nature, V. 2. p. 1. f. 9.

being chiefly to communicate existence to their living representative. Those whose ancestors, in a generation or two, are lost in obscurity, are deprived of this advantage. Ancient descent, forming not a component part of the complex idea through which they are perceived, cannot reflect any brightness on their appearance.

In fact, in feudal countries, in which a numerous herd, unable to boast of finer distinctions, is always found, long possession of ancient lands is universally observed to form a principal source of the sentiment properly denominated pride; and this vain conception must there be mightily strengthened, in all whose haughtiness is erected on that foundation, by the strong continuity with which the successive owners are perpetually linked to one another. Each proprietor, in his order, is there brought distinctly into view: Their riches or their rank, as well as their existence, are fully authenticated by the evidence without which a right cannot be surely established in their fiefs: And a notion must thence arise concerning length of lineage more firm and more lively, than can be produced by wealth among nations in which estates are reducible to fritters by division.

Persons unable to do more, or little more, than earn subsistence from day to day, or year to year, not having hearts at ease, can hardly pursue after vanities, except in a very humble and contracted line. Bread, and favours immediately connected with gaining it, will commonly bound their views. Not possessed of estates which may be expected to remain undivided or long with their children, they cannot be supposed to look forward for eminence to distant generations: And among any people, placed in circumstances such as have been described, those possessed of fiefs will

will probably be the only men to aspire at honours descendible to heirs. On that account, too, they must naturally wish, that their dignities be annexed to their lands: Observations which are particularly applicable to Scotland, and which may be exemplified, and perhaps confirmed, from its history.

In this country, a few tradesmen might perhaps earn, by their employments, a frugal livelihood in old times: But the merchants and the artizans, being mostly engaged in a loitering retail confined to little booths and to small wares, without boldness of enterprise, without extent of adventures, without skill in arts, without commodities to sell, could rarely arrive at opulence, or even leave their families independent: The bulk of the tenants, their farms small, their possessions precarious, their husbandry wretched, their cattle weak, without leases, without stocks, without tools, without crops, were rather objects of pity than men of substance*: The peasants and the labourers, wanting many of the conveniencies, and pinched even in the necessaries of life, generally dwelt in miserable hovels amidst extreme indigence and a servile dependence: And among the Scots, the only citizens, except the clergy, (if an order, which had engrossed near a half of the kingdom, can be accounted an exception) who then lived either in grandeur and in independence, or in security and in plenty, were the owners of lands.

Uneducated men, who have amassed large estates in trade, rarely display, in their ways of employing them, more than in their manner of behaviour, the elegance and the taste conspicuous in

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persons.

* Parl. 1429, ch. 125.—Parl. 1449, ch. 17.—Parl. 1469, ch. 44.—Parl. 1493, ch. 79.—Parl. 1587, ch. 115.

persons who, from their early years, have been familiarised to gentility and to splendour; and on that account, as well as from prejudices in themselves abundantly senseless, but at the same time extremely difficult to be entirely conquered, are seldom viewed, even in commercial nations, in a light equally respectful as those foolishly denominated their betters. Their riches sitting not, more than their fineries, easily upon them, excite not in the multitude, who judge by appearances, sentiments alike favourable as are naturally produced by the external aspect of others distinguished by superior grace: And if even in our days husbandmen, artificers, and merchants dare not aspire to Peerages, in vain should they have formed pretensions to nobility in ancient times.

The only tradesman, ever ennobled in Scotland, seems to have been Robert Cochrane. James III. who delighted in curious arts and in their amusing productions, more than in the burden of business and in councils of state, either from the softness of his genius, or from the delicacy of his taste, spent much of his time, in retirement from both, among a few artists, Roger a musician, Leonard a smith, Hommil a tailor, Torrifan a fencer, in whose fellowship his mind, unbending itself with freedom, found more entertainment than in the company of his nobles. Among others, Cochrane, an ingenious mason, acquired a principal share in his affection; and James, not contented with bestowing on that minion the rich Earldom of Marre, invested him with the entire direction of public affairs. The consequences are well known. Marre, amidst his excellency in architecture, was wholly unworthy of the high political station to which he had ascended. A conspiracy, excited by indignation, was soon formed against his life: His Sovereign, whose own majesty amidst its rage could not be

be secured from insult, was utterly unable to protect his minister against its fury: And the favourite, having been suddenly apprehended at Lauder, was instantly hanged over a bridge, almost in the Royal presence. Promotions entirely contrary to usage, and of course to expectation, shock the current in which our conceptions are accustomed to flow, and, seeming unnatural, it is almost impossible ever to be fully reconciled to them; but they are uncommonly offensive to the superiors with whom you are exalted into contact, perhaps even more than to the equals over whose head you vault. Cochrane's original occupation constituted a chief objection to his great elevation. "Wife and ancient Lords," Lindsay says, "exclaimed upon it, that James had made fellows!—maçons!—men who ought rather to have been holding the plough, or to have been keeping sheep—Earls and Lords!*" An amusing specimen of the haughty language with which classes of citizens, the most useful in society, are often treated; but an example exceedingly apt for illustrating the prevailing insolence of former ages.

In a heathy, savage, poor country, subject, like Caledonia, to the combined influence of all the foregoing causes; in which the feudal law domineered with a rigid sway; in which landed men, the only people who enjoyed in fulness the comforts of life, were continually surrounded by retainers, their inferiors far in every article of exterior appearance; and in which of course pride, a passion ultimately founded on comparison, could not but be highly inflated in their breasts; the proprietors of fiefs, durable things, which perhaps had already descended to them in a long series from

* Pitfcottie, p. 134, &c. 142. 150. — Hawthornden, p. 123. 130, &c. 159.

from their ancestors, and which, in a progression perpetually connected in its members, they expected to transmit to their posterity, were the only persons who in ancient times either could themselves, or would suffer others to aspire to nobility. Their houses could alone cherish any assurance of being clearly remembered in their successors; and such as not only were themselves high in rank, but whose representatives had a probable prospect of remaining long in an elevated condition, could alone form the ambitious conception of obtaining noble distinctions for their heirs in perpetuity.

As chieftainship, influence, jurisdiction, wealth, independence, all were of old annexed in that country to property in land, the imaginations of its owners would be frequently conveyed with complacency to the immediate source of their grandeur; and their estates, by which they were exalted above their neighbours, and in which they were wont to reside, would naturally be regarded by them with exultation as well as with fondness. Hence an idea of that, which in the foolish language of vanity is sometimes termed a family, would be produced among them in peculiar force: And as this conception depends on identity of estate, and perpetuity of succession or indivisibility of heritage, without which it can hardly exist *, a compounded and strong attachment would naturally be excited to that family, including both the parcel of lands belonging to it, and the series of persons expected to inherit them. Each successive proprietor, running in fancy along the line of his ancestors, would perceive, with delight, that his dignity seemed to be increased by the length of his pedigree; and

* Treatise of Human Nature, V. 2. p. 1. f. 9.

and as, in the heir of his fortune, he beheld the person in whom both his memory and his race were to subsist, a hesitation could hardly be entertained a moment in his mind about the course in which his honours ought to be secured to descend. Every honour, intended to aggrandise his house, would be incorporated with the fief to be possessed by its representative; an union entirely agreeable to the ideas primarily entertained at conferring them. In fact, nobility was originally united to lands; and causes, sufficiently powerful, as well as exceedingly likely, have already * been suggested, which in Scotland led to this junction. Among us, the first honours, by which families were ennobled, unquestionably were territorial; and, having once settled in that channel, the same causes which had originally forced them into it, especially the barbarism in which the country was involved, would make it late before they could be diverted into another course. Barbarians, from ignorance, from stupidity, and from habit, are always conceited of their own customs: Violent prejudices, tinged with scorn and even with malignity, are commonly borne by them against strange modes: And impartial inquirers, acquainted with either the former or the present state of North Britain, will not find many circumstances, which, in the fifteenth and the preceding centuries, could there bestow a high price on personal nobility among any who could pretend to it.

S E C T.

* P. 36. &c. above.

S E C T. II.

Causes which retarded the Introduction of Personal Dignities into Scotland.

IN refined ages, in which public diversions, genteel company, polite conversation, or literary society attract great multitudes of people into large cities; in which the sexes, mingling together in frequent assemblies, employ much attention, and even art, on heightning the charms bestowed on them by nature; and in which, such as have been born to independent fortunes, ambitious of adding acquired influence to natural advantages, become fond to hang about palaces and on the favour of princes; ribbands, stars, titles, every thing, which, announcing their possessors to be personages raised above the ordinary level of those who can afford to array themselves in gaudy apparel, procures a favourable reception in the high circles of the world, must be considerably prized. In populous towns, in public places, and even about royal courts, the bulk of mankind are lost in the vast crowds which encompass them, and one can hardly engage any notice without great wealth, external pomp, or extraordinary merit; causes which, among the few to whom their influence reaches, tend rather to inflame than to extinguish rivalry and emulation. Hence, ingenuity must be strongly excited there to discover objects, whose imaginary lustre shall command uncommon respect, and an artificial quality, consisting

fixing in distinctions almost entirely nominal, (which often produce effects little inferior to things real and to solid excellencies) and adapted to impose on inconsideration, credulity, necessity, and fear, has been invented, especially under monarchies, to exalt in degree those already possessed of other sources of superiority, or by presumption to supply the want of them. But in rough and unlettered times, in which the dominions of a sovereign consist mostly of desolate and barren moors; in which the inhabitants scattered over them, miserably poor and almost naked, are scarcely entitled among their species to a higher denomination than that of savages; and in which men of estate, instead of thronging into cities to enjoy the pleasures and the elegancies of cultivated life, sequester themselves within their own territories, in proud and gloomy castles, rarely beholding any equals, or little accustomed to their fellowship; things merely honorary and ornamental, bringing no solid advantage to their possessors, and making scarcely any addition to their rank, however they may not be wholly despised, must always form unimportant objects, and invention will not be greatly stimulated to search after them. At Paris and at London, men far advanced in years, of the first eminence, and of the best sense, with solicitude and with servility pant after garters of silk and crosses of spangle; but in remote provinces people are careless even about dress, because their consequence depends not upon it; and noble titles are generally either altogether unknown, or little used in barbarous and wild countries.

My Lord, on inquiry, your Lordship will discover that few or none of those causes, which might give rise to personal nobility, existed early in Scotland. Amidst great sloth, bad agriculture, little trade, and coarse manners, large cities, which are mostly

Want of
great cities.

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filled.

filled with merchants and with artizans, and with those to whose luxury they administer, can hardly arise: And we have little ground, either from the imperfect views exhibited in history of the ancient state of the Scottish boroughs, or from the exacter descriptions of the diminutive condition in which they were still beheld immediately before the Union*, to imagine, that during the reigns of the Davids, the Alexanders, and the Roberts, there was between the Solway and the Orkneys a single town which contained five thousand inhabitants.

In old times, Parliament was held sometimes at Scoon, sometimes at Cambuskenneth, sometimes at Dunblane, sometimes at Dairsey, and at other small villages†, at which either few members assembled, or those who attended must have slept in the fields or lodged in hovels. It did not become usual, till the days of James II. for the states of the realm to convene in Mid-Lothian. During the minority of James VI. a Parliament was held in 1578 at Stirling: Another was convoked at Linlithgow in 1585: A third met at Perth in 1606.

Under every regular and free government, the members who compose the legislative council and the supreme courts, added to the retainers who belong to them, form a numerous, often an opulent body; and the vast concourse continually drawn thither by business, by curiosity, and by avarice, fails not gradually to aggrandize the conspicuous theatres to which most eyes are allured by their sessions. But in those reigns no particular place had arrived either at the exclusive enjoyment of these advantages, or at

* In 1707.

† Fordun, XIII. 36. — Ad. Cafe, ch. 5. p. 9. — Pitfcottie, p. 364.

at a great pre-eminence on account of the superior accommodations found at it; and, after an attentive search, you will find it difficult in the whole kingdom to discover any which had indisputable pretensions to the appellation of metropolis. The judicial authority was mostly discharged by proprietary magistrates, whose territories were bounded by the marches of their lands. A Justiciary General, it is true, possessed the supreme power in criminal matters: But his office also, during a long period, was hereditary; and as large estates were generally created into regalities, which implied a privilege of reclaiming for trial all who lived there even from that sovereign judge, and as Parliament was wont to take cognizance of treasons against the state, his interposition was in most cases excluded, or was beheld in few. Hence, in record, that great officer makes neither the frequent appearances nor the striking figure which seem proportioned to his high authority: And no stationary tribunal, invested with a transcendent jurisdiction extending all over the nation, and appropriating long stated terms to exercising it, was established to decide civil causes † till the College of Justice, the same which still subsists, was erected by Parliament in 1532, and was ordained to hold its sessions constantly at Edinburgh.

This city, amid the advantage of a situation which, for healthfulness, for beauty, and for stateliness, is equalled by few in Europe, without grand edifices to behold, clean streets to walk, or even commodious houses to inhabit, invited not strangers, either by the variety or by the elegance of its entertainments, to resort to it. An university at which the sciences, an academy at which the exercises, even a school at which the languages might be

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learned,

† Buchanan, XIV. 43.

learned, was not early erected in that borough *. From the narrow limits within which the capital continued to be circumscribed in the sixteenth century, and from the open fields which still remained within its franchises unoccupied by buildings in 1579 †, it seems not probable, that even in the reign of Mary more than ten thousand or fifteen thousand people dwelt within its walls; and its suburbs, however enlarged of late years, were not then extensive or well inhabited.

Her predecessors, the Kenneths, the Malcoms, the Duncans, and their successors, during many reigns, resided at a distance from the frontiers of England; but their residences, being almost everywhere exposed to insult, were not long fixed, and their subjects were not excited by other powerful temptations to gather in settlements around their habitations.

In the country, a mean cunning and other low vices, connected with the continual apprehension of penury and of oppression, are sometimes found; yet men are commonly less debauched, their manners are generally purer, and perhaps, upon the whole, they are more virtuous and more happy, than in towns; the sink into which, Tacitus ‡ says, every thing filthy and atrocious is continually pouring. It must, however, be admitted, that arts cannot reach the perfection, society cannot exhibit itself in the magnificence, individuals cannot enjoy the independence, and the human mind cannot attain either the accuracy or the inventions

* Mr Arnot's History of Edinburgh, II. 1. — p. 420.

† Maitland, p. 138. 139. 185.

‡ XV. Annal. 44.

ventions which are produced by the co-operation of the wealth, of the wants, of the ingenuity, of the emulation, of the vanity, and of the force of vast multitudes of people collected together into great cities. In nations not found in this favourable condition, personal nobility, a principal part of public splendor, would not probably be early introduced, unless its introduction had been forwarded by extraordinary circumstances. Trains of nobles are appendages of royalty, and a brilliant court will naturally produce them; but Scotland can scarcely be said to have possessed even this advantage. The parity, agreeable to governments which are either perfect commonwealths, or strongly inclined to that model, recoils at the inequality implied in nobility. From the constitution of its parliament, and from the unruliness of its army, the Scottish government appears, during many ages, to have partaken of the nature of a republic much more than of a monarchy; and, in that kingdom, people of property, being little tempted to dance attendance about the palaces of their princes, could not be greatly disposed to promote the introducing among them a set of noblemen who derived not their dignity from their lands.

Want of a
powerful
court.

A Scottish King, surveyed with accurate eyes, will be perceived then to have been little more than chief commander of their feudal militia: And as in war each chieftain led his own tribe, and almost every inferior officer laid claim to a determinate post from ancient inheritance *, few, or rather no military commissions were at the royal disposal †.

Permanent

* Parl. 1455, c. 53. 89.

† The Earl of Fife led the van of the Scottish army in time of battle: The royal standard was carried in the field by a family which, from a feat of valour, acquired the name

Permanent taxes, too, were almost totally unknown in Scotland, and even extraordinary aids were extremely rare *. The public revenue, therefore, consisting chiefly in the desmone lands of the crown, and in the feudal incidents of Sovereignty †, could not but be very narrow. The regal authority, also, was extremely circumscribed; and the Prince, whose only guards ‡ were politic conduct, could not excite awe, either by the grandeur in which he lived, or by the attendants who waited on his family.

A potentate, who, with the name of King, was no more than a superior sort of Laird ||, could not expect that grandees would stoop

name of Skirmisher: The right wing was commanded by the house of Douglas. Fordun, V. 9. 36. — Major, III. 5. — Buchanan, VII. 14. 20. — Anderson's Diplom. 43. 44. — See Hawthornden, p. 294. 295. — Pitcottie, p. 319. 320. — Parl. 1600, c. 21. (not printed.)

* During the minority of James I. the Duke of Albany resisted an impost of two-pence, that parliament was going to lay on each house in which fire was lighted, saying, that no tax had been imposed during his Regentship, and that the poor would curse the man who should introduce such an abuse. Even a tribute entirely agreeable to the feudal customs, which admitted of a tax to raise money for redeeming the Sovereign from captivity, imposed for discharging the ransom (L. 30,000.) of James I. was exceedingly unpopular; and the King, after having levied the first payment, was obliged to remit the remainder.—Fordun, xv. 21.—Major, vi. 10.—Parl. 1424, c. 10. 11.—Buchanan, x. 27.—Hawthornden, p. 16.—Rymer, x. 299. 303. 322. 325. 326.

† Parl. 1483, c. 106. § 5. — Parl. 1476, c. 86. — Parl. 1489, c. 24. — Parl. 1493, c. 83. — Parl. 1581, c. 36. — Parl. 1587, c. 29. 31. p. 542.

‡ Till the days of James VI. to whom parliament, in 1584, granted a guard of forty horsemen, with two hundred pounds a year to each, payable out of the first fruits of vacant benefices. Parl. 1584, c. 13. and act 14th (not printed) of that parl.

|| In Scotland even prayers seem not to have been offered up in church for the preservation

stoop to discharge servile offices about his person. Amidst a mimicry of royalty, many of those places which are commonly established in the households of Princes, as well as the principal military commands, seem, on that as much perhaps as on other accounts, to have been early alienated from the Scottish crown, by perpetual grants in inheritable fee. The royal household was governed by a hereditary master: A hereditary butler kept the royal cellars: A hereditary usher introduced to the royal presence: A hereditary cupbearer served the royal wine: Even a hereditary carver cut the royal meat*: And either the duties of these offices might be performed by deputies, or personal attendance was not expected from those who held them. The Sovereign, without magistrates to nominate, without officers to appoint, without revenues to distribute, had little to bestow. In consequence, the royal favour was not an important acquisition; and the court of Dunstaffage or of Abernethy, without vacancies to fill, and without expectations to raise, could not but be thinly attended.

During those fierce ages, in which our legislative body, from the sturdiness of its construction and the unpliability of its parts, had not become a manageable, hardly an ordinary member of the political machine, interest and weight at Scoon, or even at Holyroodhouse, depended not on the number of mercenaries whom a man commanded in the senate, but on that of the partizans whom he could bring into camp; and the surest hopes of succeeding in any requests at the foot of the throne, were entertained by those who could render themselves formidable in arms.

Among

servation or the family of the king, till that distinction, obtained from the clergy by James I. had been authorised by parliament during his reign. Parl. 1424, c. 43.—Parl. 1425, ch. 62.

* Parl. 1430, c. 126.—Parl. 1455, c. 157.

The custom of living at a distance from court and from town.

Among a people, neither living in town, nor attending at court *, but thinly dispersed over a barren land, largeness of estate, extent of jurisdiction, multitude of followers, were articles substantially useful, as well as extremely flattering; but either from a rustic pride, from a phlegmatic apathy, or from just conceptions, empty honours, which brought little solidity along with them, might remain unfolicited, or sometimes be rejected with contempt. A superior among his vassals, a chief among his clan, a landlord among his tenants, in a mountainous and desert country, finds mere gewgaws little necessary, or little important, to his aggrandizement; and, even in our days, a gentleman, whose thoughts roll not towards London or St James's, and whose neighbours are not infected in their sentiments from acquaintance with these places, needs not a title to add to his importance in Bara or in Vift. In old times, in which each considerable estate was erected into a petty principality, property and descent would generally be found of themselves sufficient to procure one in his domains all the respect and all the submission which vanity and interest usually demand. Adventitious advantages, which persons of small fortune, and of ignoble birth, might affect, if not attain, would often be despised or overborne; and many, even among those possessed of lands, would not be deemed worthy of nobility.

In a clan, subordination is necessary, as well as in an army: An inferiority is implied in vassalage: And a partizan or a vassal, even though he held some of that species of property, durst not aspire to independence on his chief, or to equality with his superior. In every country, too, in which the prejudice inspired by a barbarous custom prevails over the justice demanded by natural affection,

* Buchanan, x. 41.

affection, younger children, seemingly neglected by their parents and by law, in a few generations must mingle in obscurity among the common herd of mankind; and an affectation of any dignity, by which they should be lifted near in rank to their eldest brother, the idol cherished with partiality by both, would be deemed, in persons reckoned hardly worthy to gather the crumbs that fell from his table, a declaration of hostility, or an act of treason.

Hence nobility was long almost exclusively confined among the Scots to great, and even to chief families; and very large estates were alone raised to noble honours. Our ancient Earldoms seem to have been extremely few in number: Perhaps at no one period did they ever amount to forty. Those few which existed, Fife, Marre, Lennox, Sutherland, Ross, Menteith, Carrick, Athole, were all possessed by principal and very powerful houses; and hereditary dignities having once been united to lands, would not soon be severed from them in Scotland.

Its inhabitants, scattered in a cold and furlly latitude, among rugged and inhospitable mountains, or over blustering and inaccessible isles, washed by the farthest ocean of the West, and removed towards the northern extremity of Britain, at a distance from the rest of Europe, were seldom visited by strangers; and maintaining little intercourse with other nations, either wanted adequate opportunities of becoming acquainted with foreign manners, or had not a turn sufficiently liberal to adopt such as were preferable to their own. Hence improvements, and even changes, were slowly wrought on the customs and the practices of the Scots: The haughty prejudices inspired by the feudal system were fondly nourished in their breasts; and of course forms and usages,

Strong prejudices in favour of the feudal customs.

as well as ideas and sentiments, agreeable to these, continued long to prevail among them. It was by an exertion, made in England not forty years ago, that tenants were at last rescued from the servile state in which they had till then been kept in the North, and even that landholders were finally delivered from the oppressive conditions of military tenure*: And in a desert overgrown with clanship, with barbarism, and with heath, without large cities, without grand assemblies, and without wealthy tradesmen, it would be late before proud and powerful Barons could endure to behold a rank, equal to that sustained by the ancient inheritors of noble fiefs, and from habit supposed to belong peculiarly to them, conveyed to persons whom, in their moments of insolence, they might term mean upstarts, by those slender vehicles parchment and ink, not consolidated with any dignified estate, and entirely independent of landed property.

S E C T. III.

Noble Honours, disconnected from Fiefs, were probably introduced into Scotland about the Time of James the First.

FROM the ignorance or the carelessness of the Scottish historians, from the scantiness and the defectiveness of the public records, and from the inaccuracy or the indistinctness of both, it is now become almost impossible to ascertain, with precision, the
time

* 20mo G. II. c. 50.

time at which personal dignities were first introduced into Scotland: But we can approach very near it; and, if one might venture on a conjecture, I should point to the reign of James I. for the period about which the innovation was most probably made. This prince, whom his father Robert III. had been advised, either for the safety of his person, or for the improvement of his mind, to send at a tender age into France, happening on his voyage to put ashore near Flamborough, was made prisoner by the people of Yorkshire*. Henry IV. who, on the deposition of Richard II. had been raised to the throne of England, then reigned in that kingdom. Tempted by the mighty advantages, which it was not unnatural at first sight to imagine might accrue to his own subjects from holding in captivity the heir-apparent of an inimical state, his lofty spirit, which had early formed the magnificent idea of obtaining possession of the English Crown, unable to resist seizing on the splendid prize which had been thrown by fortune in his way, lent a deaf ear both to the pathetic supplications preferred by an aged parent in behalf of his only son, and to the generous counsel, dictated perhaps by sound policy as well as by fair hospitality, of ordering the Duke of Rothesay to be restored to liberty. Henry's mind, however, neither forgetful of the conduct which it became his own dignity to hold, nor insensible to the feelings of humanity, did not permit him to neglect the education of a young prince, whom a misplaced confidence or an unfortunate accident had reduced under his power. Much attention was bestowed on instituting the King of Scotland; and natural parts, or natural disposition, rendered James not an unhappy subject of the liberal pains which were employed on their cultivation.

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Literature,

* Fordun, xv. 18.—Boet. xvi.—Major, vi. 8.

Literature, and the unquestionable superiority as well as tranquil enjoyments derived from it, command an awful admiration in the secret thoughts even of those brutal spirits, who, either from a consciousness of inferiority, or from innate doltishness of soul, affect to despise them. But a natural elegance of taste, united to considerable vigour of understanding, produced in James a sincere love of knowledge; and, during his residence in England, he made a great progress in acquiring it*. In those days the southern parts of Great Britain, compared either with the improved condition in which they are found at present, or with the superior politeness at which the Papal territories had then arrived, may well be pronounced to have been extremely rude, but still were incomparably more civilized than the stormy region north of the Tweed: And James, on returning into his own dominions, polite, accomplished, and learned, after a residence of eighteen years in the Castle of Windsor, about the Court of London, or in camp on the continent, was both shocked and astonished at the misery and the grossness in which his people were involved. A thievish habit, a base revengefulness, a relentless cruelty; vices incompatible with the welfare, and almost with the subsistence of society; were found by him to be very generally prevalent, especially among his mountains, and even to be favoured by the whole genius of the ancient constitution, as well as by the inveterate prejudices of his subjects: The devoted attachment maintained for their chiefs by the hordes of dependants who were continually encamped about their castles; the mutual support blindly afforded by each clan to all its members against every other; the extreme

* Fordun, xvi. 28. 29. 30.—Boet. xvi.—Major, vi. 14.—Buch. x. 13. 14. 52.—Leslie, vii. 56.—Hawthornden, p. 12. 49. 50.—Hume, ch. 18.

extreme difficulty which public justice found in reaching their rugged retreats. Hence violence and rapine prevailed, and were even honoured, over a wide extent of the country: Property, tranquillity, life, held on a precarious tenure, could not be securely enjoyed: Honest industry was despised, or was not encouraged*. Evils so deeply rooted in the temperament of the Scots, could not but be difficult to correct: But a high indignation was excited by them in the noble mind of James; and his steady spirit, which glowed with affection to his subjects, despaired not, by judicious interpositions of the legislative power, and by firm exertions of the judicative authority, to effect a great reformation both on their sentiments and on their conduct.

The only means, by which either an accurate philosophy or an enlarged experience permits any reasonable hopes to be entertained, that an important change may be wrought on the manners and the morals of men, are those which, attacking their prejudices and their habits, pierce to the roots and the sources whence their vices spring. Other remedies may afford a temporary relief, but never work radical cures. James, therefore, resolved to strike deep, and, by removing their causes, to extirpate, if possible, the disorders with which his people were over-run. His plans, like their objects, were extensive: And your Lordship, on examining his statutes, or on consulting his history, will find, that few articles which were suggested by the immediate distresses of his countrymen, or which might probably contribute to their felicity, escaped his notice or were overlooked in his schemes.

It

* Hawthornden, p. 24. 25. 30. 212. 213.—Parl. 1424, ch. 50.—See Parl. 1581, ch. 16.—Parl. 1594, ch. 231.—Parl. 1597, ch. 266.—Parl. 1609, ch. 7.

It would, however, be absurd to pretend, that, in the improvements attempted by him, his eyes were primarily fixed on the introduction of personal dignities. His immediate as well as grand aim unquestionably was to diffuse and to ensure solid and political happiness, that is, plenty, freedom, safety, knowledge, and civility, among his people. But some of the measures adopted by him for this purpose tended directly towards detaching honours from property; and others, seemingly remote in connection from that innovation, were related, at least at a distance, to those views which may reasonably be supposed to prevail at establishing it.

James I. endeavoured to reduce the exorbitant consequence of landed property,

As the mighty influence, derived from landed property, was one principal cause of the wildness and the ferocity with which his territories and their inhabitants were over-run, strenuous exertions were bent by James to reduce its exorbitance. With this view, not only were wise laws passed, during his reign, for repressing theft and violence: A direct and bold attempt was made by him to dissolve those unruly associations termed Clans, together with the impolitic consequence proceeding from them. Leagues and bands, into which the Scots had at first been engaged by the barbarism of their country to enter among themselves for safety, contributing both to perpetuate and to extend the mischiefs which had originally led to forming them*, were strictly prohibited by his statutes†. The great number of attendants, by whom his grantees, from ostentation or from fear, had usually been accompanied‡ in their excursions, was reduced to a retinue which should be

* Above, p. 11.

† Parl. 1424, ch. 33.

‡ Pitscottie, p. 14.

be decent, without being terrible or oppressive *: And a superior tribunal, called the Session, was erected by Parliament, to be composed of the Chancellor, and of other respectable committees chosen from its members by the King, whose transcendent power, high dignity, and great weight, might, more surely and more firmly than the Justiciary General, either supersede the authority, correct the abuses, or punish the partiality of the proprietary judges. This itinerant court was appointed to hold, in every year, three sessions at any places which his Majesty should direct †. In order to invigorate its resolution, as well as to add force to its decisions, his active spirit persuaded the King to make in person a progress through his dominions; and on that circuit, at Inverness, a borough situated in the heart of the depredators whom he was chiefly desirous to tame, he apprehended and executed justice on many leaders of those gangs, by which a great part of the country north of the Tay had been perpetually infested ‡.

A principal object, towards which James's views were directed, was gained by that regal visitation. His savage Barons, amidst the stately lives led by them at a distance both from court and from town, were made sensible spectators of a higher power, whose long arm could reach them even in their own fastnesses, and, what was more mortifying, were humbled in the immediate presence of their dependents; and the inordinate importance, annexed to landed property, was greatly diminished in the imagination of his countrymen.

Hence,

* Parl. 1424, ch. 5.—Parl. 1427, ch. 120.

† Parl. 1425, ch. 72. 73. 74. 75.—Buchanan, x. 36.—Leslie, vii. 263.—Hawthornden, p. 30.

‡ Fordun, xvi. 15.—Boet. xvi.—Major, vi. 12.—Buchanan, x. 30.—Hawthornden, p. 25. 29.

Hence, in a few years, wonderful effects were produced all over the country. Either the sentiments and the manners of the barbarians had been caused to undergo a real change, or the dread and the awe in which they stood of his virtues and of his authority, suspended for a time their wonted excesses*: And the Earl of Ross, a potent chief, finding that his person, though defended by several thousand followers over whom his sway was absolute, could not be safe even in the distant Isles of which he was Lord, was obliged voluntarily to surrender himself at Edinburgh, and there in rags to implore clemency at the feet of his Sovereign †.

put a high
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In the state in which Scotland was then found, every measure productive of those effects had some tendency towards disuniting dignity from lands, and indicates also in its promoters a disposition which would relish their disjunction: And, perhaps, the increased respect, which began then to be shewn to civil accomplishments, co-operated towards forwarding the disannexation. A Prince, whom good sense rendered capable, on an impartial comparison, of recognizing the mighty improvement derived to his own mind from literature and from contemplation, shocked at the brutish ignorance by which his subjects were debased, would be studious both to dispel the clouds that overspread their understandings, and to obtain for intrinsic merit general acknowledgements of that superiority which is its just prerogative, above an
advantage

* Fordun, xvi. 33. 34. — Boet. xvii. p. 361. — Major, vi. 14. — Hawthornden, p. 29. 50. 51.

† Fordun, xvi. 16. — Boet. xvii. — Major, vi. 12. — Buchanan, x. 32. — Hawthornden, p. 26.

advantage merely casual, unconnected with intellectual endowments and with moral qualities. Not only were schools and seminaries, at which philosophy and science might be learned and cultivated, founded and endowed by his munificence : Much pains was also taken by James on inviting into his dominions ingenious men from foreign universities ; and, on their arrival, he was particularly attentive to distinguish them by his favour, as well as to enrich them by his bounty. Their strong sense afforded a repast more grateful to his liberal soul than either the boisterous vociferation excited by spiritous liquors among rough Barons, or the insipid water-gruel furnished amidst reserve and ceremony by feeble courtiers : And exterior respect, to which even philosophic geniuses are seldom indifferent, rarely fails to impress on their spirits an alacrity which greatly enlivens their movements. It will not therefore surprise your Lordship to hear, that he spent many of his vacant hours in their company, and that he submitted even to the disagreeable servitude of attending their public exercises *. The superior estimation, in which personal merit was held by him above external advantages, was distinctly marked by that attention ; and the familiar approaches, with which all possessed of it were admitted to the Royal presence, raised them really nearer an equality with their Sovereign than those, in modern times termed Peers of the Crown, whom the King did not esteem worthy of a like intimacy.

I dare not, however, assert, that any, whose sole recommendation consisted in literary excellence, were actually ennobled by James. Wise monarchs always pay a great deference to establish-

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* Fordun, xvi. 18.—Boet. xvi. xvii.—Major, vi. 13.—Buchanan, x. 38.—Leslie, vii. 264. 268. 269.—Hawthornden, p. 30. 31.

ed customs, on which their own power is ultimately founded, and which therefore must restrain it. But a king, intent on lessening the consequence of land, might naturally think, without bestowing a noble denomination on their estates, of conferring on some persons, whom competent fortunes should prevent from seeming improper companions * for him, the same rank and the same titles which had commonly been derived by a reflex communication from fiefs : And other coincidences, discoverable during his reign, are apparently connected with that thought.

encouraged
elegant man-
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blies,

The rusticity and the impurities, which James observed to defile a great majority of all the Scots, were exceedingly offensive to his delicate nerves. To introduce among them habits of cleanliness, with which decency and neatness in apparel are nearly related, a taste for dress and even for finery was promoted by him among his subjects. Genteel fashions, as well as rich stuffs, imported from foreign countries, were fondly studied at his court : And balls, masques, concerts, every species of public diversion at which the sexes delight to exhibit themselves in their best array, were greatly encouraged, and became frequent there. A sensibility of heart, united to a delicacy of ear, rendered the king passionately fond of music †. His voice was uncommonly sweet : He sang, as well as played, on several instruments, with taste and with dexterity ; and his consort, an amiable woman, delighted in those pleasant embellishments or splendid spectacles of life ‡.

In

* Comites.

† Organs, which before his reign had hardly been known in Scotland, were then erected in cathedral churches, as well as in his own chapel, and caused to bear a part in the public worship.

‡ Fordun, xvi. 28. 29.—Boet. xvii. 17.—Major, vi. 14.—Leslie, vii. 266.—Buchanan, x. 42. 57.—Hawthornden, p. 31. 36. 49.

In the helplessness of infancy, in dependence on others, in extent of abilities, in capacity of enjoyment, in pretensions to pleasure, in aversion to pain, in susceptibility of distress, an original equality must be owned to subsist between all mankind, without any distinction proceeding from parentage, from riches, or from rank ; and a humane politician, whose soft nature is feelingly impressed with lively sentiments concerning that primitive equality, may sometimes be inclined to lament inventions, whose undisguised pride or wasteful expensiveness seems either to insult the miserable creatures, or to extend the artificial disparity, often presented to view in the actual world : Or abstruse thinkers, over whose broken spirits severe application has diffused a pensive melancholy, may imagine, that the momentary amusement, found in brilliant assemblies and in gaudy processions, affords not an adequate compensation for the extreme debility or distressful languor thrown by them, after a tedious, often an unsatisfied, expectation over the fatigued nerves and exhausted soul. The kindness, however, and the respect which men are obliged at least to affect outwardly for others, engaging them frequently to prefer their neighbours to themselves, operate by habit ; and moderating or refining selfishness, as well as restraining fierceness and brutality, bestow, perhaps, some reality on those appearances of benignity and of virtue which must be assumed by them in public : And it must be owned, that places of dissipation and scenes of vanity, with which personal distinctions and illustrious titles are closely connected, contribute, if not under arbitrary governments to give a mildness to the despotism of the magistrate, at least in barbarous states to polish the rudeness of the people, and in all cases to increase the brilliancy of society. Much scandal and frequent murmurs

were excited * against the polite entertainments or superior luxury which had become fashionable at the court of Perth, especially among those rigid zealots, whom a temper, tyrannical perhaps as well as envious, impelled to forbid others amusements from which a dissembled austerity or affected grimace excluded themselves. Nevertheless, in the wild condition in which Scotland was then placed, perhaps they were not less proper to be encouraged, than a rage for them ought to be restrained in nations advanced from civility and refinement to corruption and to folly. Not only would the roughness of discourse, and the boorishness of behaviour, which shock the ingenuous feelings of modest natures, be somewhat reformed in those mixed assemblies which were patronised by the Scottish Queen: The increased demand, created by them for fine clothes and for other commodities, afforded much encouragement to ingenuity and to industry; and people of estate were invited from the country into town, there to mingle with their equals at public places, at which men find, that even amplitude of fortune is not able, without softness of manners and politeness of address, to render their company perfectly agreeable. Theatres, too, were erected, in which the splendour of a title might be displayed in sight of the fair; and those who were not possessed of an adequate extent of property, but who would still be ambitious of precedence, were stimulated to invent a species of honour, which should raise their persons to a level with such as derived dignity from the nobility of their lands.

In those who are not Lords of fiefs, honours can only be personal; and the steps already taken by James were advances silently made

* Leslie, vii. 264.—Hawthornden, p. 32.—Parl. 1429, c. 133.

made towards their introduction. Among the multiplicity of objects which engaged his attention, as considerable alterations were made by him in the administration of justice, and in the forms of the government, it is not improbable that the nature of honours, and the orders of the state, likewise underwent a change during his reign. Even the names, as well as the departments of office, then suffered an alteration, and, in some cases, were modelled after the English fashion *. Parliament itself was attempted, in his days, to be moulded after that pattern; and the changes made by him on its frame led immediately towards introducing personal dignities.

In former reigns, this assembly had rarely been convened, and its sessions had always been short. James, knowing that his schemes might be much forwarded by the great weight derivable to them from the general approbation of his supreme council, resolved both to convoke that body more frequently, and to extend the subjects of its deliberation farther, than had been usual in preceding

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constitution
of Parlia-
ment,

* For example. In former times, the Great Chamberlain had been invested with the double charge of exercising a jurisdiction over the boroughs, and of collecting the revenues of the crown: But these duties were severed from each other by James; and a Lord High Treasurer was entrusted with the latter business, while the other branch was allowed to remain with the Chamberlain. Probably, too, the royal household, till his reign, was governed by the High Stewart: But this office had been early conferred by Malcom Canmore, by David I. and by Malcom IV. in property, on the heirs of Bancho, Thane of Lochaber, and of his son Fleance, personages from whom the family, which was at last raised to the throne, is often proclaimed in the theatres to derive its origin; and, perhaps, on this account, James, the grandson of the first Stewart, who, at an advanced age, had succeeded to the crown, substituted in their place an officer under the name of Master of the Household.—Macbeth, Act. 4. sc. 2.—Crawfurd's Officers of State, p. 252. 355. 356. 357.—Leg. Mal. c. 5.—Crawfurd's History of the Stewarts, p. 1. 2. 3.

ceding times. During the few years which passed after his return from captivity, thirteen different parliaments were held in Scotland; and your Lordship will find their statutes directed to a vast variety of matters proper for legislative regulation.

The ancient Barons, whose dull spirits were almost incapable of being roused without violent excitors, generally found a higher relish in rural sports than in political debates. Hence, in that convention, it had long been customary for the members to officiate by proxies; a privilege seemingly repugnant to the nature of a deliberative assembly, entrusted to hold consultations about public weal *. Its absurdity was soon noted by James; and, in his third parliament, an act was passed, ordering all those, who were bound to be present, to attend in person †. It is not unlikely that the King, in procuring this regulation, designed to display the real impracticability of personal attendance; and, by affording a trial and experience of its expensiveness and inconveniency, to smooth the way for the grand alteration which he had in contemplation to make on the constitution; or, perhaps, he meant from numbers, and from unanimity, to derive stability and force to his purposed innovation. James's views were certainly more extensive, as well as his taste more refined, for his understanding was more masculine, than one should expect either from a royal education or from his illiterate age; and a full convention of all the vassals, who held of the crown, would quickly be perceived by his penetration to be an assembly debased by ignorance, liable to passion, guided by prejudices, intractable to reason, unwieldy in itself, and formidable to its Sovereign. In England, the advantages derived to the

* Parl. 1640, c. 20.

† Parl. 1425, c. 58.

the people, as well as the dignity attained by the Monarch, from the distinction established there between the nobility and the commonalty, had not escaped his observation; and he had remarked, that, in the constitutional superiority bestowed on the former order, who were generally attached to the crown, the alone source of their eminence, a proper balance was found to support and to protect both the Prince and the commons against the haughtiness and the oppression of the other owners of land. It is not improbable that James's discerning spirit was desirous of introducing a like distinction among his own subjects, imagining that a regularity should be acquired from it to government, that an authority should thence be given to the laws, and that by their means peace and civility and justice should gradually be introduced and diffused and established among his people: And foreseeing at a distance the real consequence which would finally accrue from an exclusive right to hereditary seats in the legislative council, he seems, in prosecution of his views, to have entertained a design of altering the feudal constitution of the parliament of Scotland, and of dividing it, like the English, into two houses. One house he proposed to form out of the dignitaries superior to Barons; and, in the other, he intended to substitute a regulated representation instead of personal attendance.

It would have been too bold a measure, all at once, either directly to exalt the nobles, by bestowing upon them, exclusively, inelective and hereditary seats, annexed to their blood, and independent of their property, or to degrade the commoners, by stripping them of those privileges to which their freeholds gave an unquestionable right; and James probably was aware, that potent Barons might not admit it to be in the power of a feeble crown:

crown to introduce among them an order of men not possessed of the qualifications which, for time immemorial, had been required by custom. The Scottish King, however, ventured on making some advances towards establishing the alteration: But he took care to proceed with a discretion, which should prevent it from causing offence to those whose franchises would ultimately be deeply affected by the innovation; and not till, from the immense multitude of freeholders, who had probably assembled in obedience to his recent ordinance, every person must have become sensible, by a decisive experiment, of the inexplicable confusion in which parliamentary business would be involved by a general, indiscriminate, tumultuary attendance. In the year 1427, Dukes, Earls, Bishops, Abbots, Priors, Lords, and Barrenents, were appointed thenceforth to be summoned to parliament by a precept specially directed to each of them, and were even ordered to be received in consequence of that summons *. The other freeholders were not expressly excluded from sitting in it; but a general statute, in which they are all of them, without any exception, indiscriminately comprehended, as well as distinguished from the nobility, under the humiliating denomination of the Small Barons and Free Tenants, was passed, dispensing with their attendance, on condition that each shire should choose annually, at its head court, at least two commissioners, (for the number was not limited), to appear in their stead. The deputies sent by the counties were not to be honoured with special summonses, but to be empowered by commissions †, authenticated under the seals of the sheriffs and of several barons of their respective shires, to hear, to treat, and to determine, in all affairs brought before parliament, and

* Parl. 1427, c. 112.

† See Parl. 1597, c. 276.

and were also, in some sort, to be separated from the other members: For they were ordered to elect a wise and expert man, to be named the Common Speaker of the Parliament, whose business it should particularly be to propose there all matters pertaining to the commons.

In this indirect way inelective seats were attempted to be taken from simple baronies, and to be confined to noble denominations: And the right conferred by the act of 1427 on those, who should be summoned under the title of Duke, of Earl, or of Lord, to be admitted into parliament, seems a nearer approach to personal Peerages, than even the power, granted to the crown by posterior statutes, of requiring the attendance of any freeholder, whom his Majesty, by a precept specially directed to him, might command to give it *. The latter power extended only to such as had antecedently a right to sit, and, in consequence of their freeholds, might come if they pleased without a summons; and, supposing that the requisition made on them was not to be accompanied with any change in their rank, bears little resemblance to the high prerogative of ennobling by writ: Nor does it appear to have ever been exercised by the crown. An alteration, more violent as well as more extensive, was certainly produced by a similar ordinance made in the year 1587, and proper Peerages were then introduced by an act, which, without, in direct terms, depriving the small Barons of their seats, did little more than grant them a like conditional dispensation, and even ratified the statute of 1427. It may therefore be pronounced not to be improbable, that, in order to approximate the constitution of Scotland,

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* Parl. 1457, c. 85.—Parl. 1503, c. 113.

land, whose prosperity James was studious to promote, as near as circumstances rendered possible, to the model of England, which he had observed already to be in a flourishing state, that personal honours were imported by him into that kingdom. A Prince, whose plans extended almost to every object, would scarcely omit an alteration which coincided exactly with the general system, steadily pursued by him, of degrading landed property. Instances of these dignities, which seem perfectly unequivocal, can be distinctly traced very near to his days; but not a vestige of them, except, perhaps, a single example in the royal family, is to be found before his accession: And, on a full consideration, your Lordship will not find, in the whole history of Scotland, any period about which it is more likely that they were introduced than the thoughtful reign of James I.

S E C T. IV.

Before 1587, Personal Honours were not Peerages.

THE particular Prince, indeed, under whom personal titles were imported into this country, is not an extremely important matter: For two propositions seem undeniable; first, That those honours had been brought into it a considerable time before the year 1587; secondly, That they still continued not to be Peerages till the great alteration then effected on parliament and on them.

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In the Scottish records, several noblemen are found bearing the titles of Lord and of Earl, long before their estates were erected into Lordships and into Earldoms. The lands and estate of Castillis continued to be no higher than a Barony till the year 1642, and were only then erected into an Earldom by Charles I. But Gilbert Kennedy, a grandson of Robert III. appears to have been created Lord Kennedy about 1459, during the reign of James II. His brother, the excellent Bishop of St Andrews, in consequence of his personal character, on which high eulogies are bestowed by historians, perhaps more than of the near relation in which he stood to the King, was long possessed of the first authority in his country: And his grandson, David Lord Kennedy, one of those who perished in the battle of Flowden, was advanced to the dignity of Earl of Castillis by James IV. in 1509 *.

The estate of Home was no more than a Barony in 1509: But, in 1473, Sir Alexander Home, grandfather of the Prime Minister of James IV. was created Lord Home in parliament. He is one of those few of whose creation a minute is still extant in the journals †. His great-grandson, Alexander Lord Home, a favourite of James VI. was created Earl of Home soon after the accession of that King to the throne of England. The estate, however, had not yet been erected into an Earldom; and I am not certain whether it was ever ennobled ‡.

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Perhaps

* Cases exhibited to the House of Lords in 1761 by the Earl of March and Sir Thomas Kennedy.

† Aug. 2. 1473. Quo die Alexander Home de eodem, miles, factus fuit Dominus Parliamenti.—Records of Parl. B. 2. p. 96.—Case of the Earl of March.—Lovat, Memor. p. 7.

‡ See note [K.] at the end of the volume.

Perhaps it was intended in 1427, both by the legislature to bestow on the Sovereign, and by James to obtain for the crown, a prerogative of annexing inelective seats to blood alone, and to sever that privilege from property. It seems, however, to be pretty certain, either that this intention was never carried into complete execution, or that a prerogative so lofty, corresponding little with the circumscribed condition in which the royal authority was then found, was never exercised by the King. Summonses are ordered by the act then passed to be given to Barons, but are not even allowed to be directed to commoners of inferior degree: And the same arguments, which evince that before 1587 territorial honours had not been proper Peerages, establish that those noblemen, on whom personal dignities were conferred before that year, were not Peers, in the just sense in which this word can alone be understood. The right, which they had to vote in that assembly, was not derived from their honours, but independent of them: And Buchanan, who could not be ignorant of their effects, affirms *, that an empty title still remained, even in his days, the sole advantage which their possessors reaped from them.

The personal honours which were introduced by James, perhaps I ought rather to say, which were intended to be introduced by him, were still designed not only to be annexed to blood, but to bestow on their possessors a superiority above those whose estates were not inferior to theirs in denomination; and this precedence was to be taken in parliament itself, and in presence of the Sovereign. Hence it is not improbable, that parliamentary consent was

* Nunc vero, nec ullus in novis honorum nominibus est modus; neque, praeter inane nomen titulum, ullus nominum usus. vi. 52.—Buchanan died in 1582.

was at first deemed necessary, or at least from prudence was obtained, to their creation. Dignities, conferred after a manner different from the only fashion which had been used for time immemorial, and which, on that account, might alone be reckoned constitutional, would naturally be legitimated by acts passed by the states of the kingdom. Persons raised to honours, no doubt, were admitted with solemnity to the places belonging to their rank, and their promotion would always be formally authenticated to the house. Accordingly, titles or dignities appear from record to have been early granted in parliament: Cincture of the sword, imposition of a cap of gold, and other ceremonies, were employed in that court at conferring them: And persons, ennobled in this way, seem to have been peculiarly distinguished by the name of Lords of parliament.

The records of our legislative council, anterior to the reigns of the Jameses, are mostly lost: That assembly, which in 1707 was for ever dissolved, never to be re-convened after the commencement of the Union, neglected to order full copies of their ancient votes to be published for the instruction or entertainment of posterity: And this curious monument of antiquity, a work, which perhaps your Lordship will think it a national reproach has not been long ago undertaken at the public charge, and which many gentlemen would cheerfully contribute to execute at their private expence, hath not hitherto been even begun. Hence those volumes, which would certainly throw much light on the history as well as the laws of Scotland, particularly on the constitution of parliament, and on the nature of Peerages, buried in dirt, and exposed to worms and to corruption, are accessible to a few Antiquaries only; and not being easily read, their contents
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are little known even among them. I have heard, however, that about thirty-seven entries of creations made in the House are still found in the journals. The exact number of those prior to 1587, or the precise terms in which the minutes relative to them are couched, I pretend not to know: But it seems probable, that most of the titles, conferred by investiture in parliament, were merely personal.

S E C T. V.

Descent of Personal Honours before 1587.

IT is natural at first thought to conclude, that these titles, not being annexed to lands, or even connected with them, would not be governed in their descent by that of the fiefs belonging to the noblemen on whom they had been conferred; but that, being qualities originally bestowed on favoured individuals, from a peculiar attachment to their persons, they were always destined to proceed in the blood to which they had been united; that, of consequence, from their primary institution, before as well as after the year 1587, they were limited to descendants of the persons first ennobled by them; and that their possessors never enjoyed a power to alter the course appointed for their devolution by the Sovereign. The persons, called by the King to take them in succession, being all of them immediate objects of the royal favour, could not be frustrated, by a disposition made by a subject, of
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their inheritance. Aliens, from the noble blood in which they inherited, could not in that impure way acquire to their own a quality communicable only by irradiations from Majesty : And if we were to suppose that they had been originally designed to be borne in parliament more immediately than in other places, it might also be presumed, that, intended only for such as were capable of giving advice in the national council, they were always limited to heirs-male * ; a limitation seemingly agreeable to some ultimate views, discoverable by a profound philosophy †, which might imperceptibly guide to it.

In consequence of the superiority arrogated to itself by the one sex above the other, children carry the name of their father ; families are held to be continued by males ; and you may remark, that if, after a long descent, the name is at last changed, or if, even without changing it, a female happens to succeed, a break seems to be made in the line, its continuity is destroyed, and the house appears to be arrived at its end, till, in a number of generations, that interruption comes to be unknown or forgotten. Every thing which conveys the fancy more smoothly and more distinctly from one generation to another, strengthening the connexion arising from blood, or the propensity and tie which bind relations together in the imagination, must invigorate that conception, and lengthen the line of ancestry ; and exclusion of females, and succession of males, as well as identity of estate and sameness of name, (articles to which much attention has been paid

* See note [K.] at the end of the volume.

† Treatise of Human Nature, V. 2. p. 1. f. 5. 9. 10.--See p. 128. 129. 130. 134. 135. above.

paid in some countries) adding force and liveliness to the perception of the different branches that form a pedigree, it must be owned, convey a firmness and a vivacity to the ideas of the preservation and the representation of families: But I suspect, that they are egregiously mistaken, who suppose these contrivances not to be modern inventions. In ancient times, in which records and history were rare and imperfect, they seem not to have arrived in Scotland at that pitch of perfection in either the theory or the practice of the arts of vanity; and those metaphysical refinements, or perhaps natural causes, discoveries of long observation and of deep thought, on which masculine succession is ultimately founded, yielded to parental affection and to other principles, whose operation circumstances rendered more efficacious. Men excluded not their daughters from inheriting their lands: Females were admitted to succeed: Feuds were even divided among co-heiresses: Names were little minded in succession: And the greatest estates, as well as the highest honours, passed from one family to another different from it in blood and in denomination*, because

* The surname of the Earls of Angus, in consequence of the succession of Matilda, an heiress of the lands, became Umfraville, that of an Englishman who married her. On the forfeiture of Gilbert de Umfraville, the Earldom was conferred on Sir John Stewart of Bonkil; and, after the Earl of Douglas espoused Margaret Stewart Countess of Angus, the surname of the family from Stewart was changed into Douglas.—Rymer, ii. 73. 200. 249. 531. 594. iii. 52.—See note [F.] at the end of the volume; and p. 77. above.

The surname of the old Earls of Marre was Marre; but, by intermarriages, from Marre was altered first into Douglas, then into Stewart, and at last into Erskine. See p. 77. 109. above.

The surname of the Earls of Strathern, from Murray became Stewart, and from Stewart became Graham. See p. 106. above.

cause land was the possession which was principally valued, and to which all honours were annexed or paid.

Real property, noble estates, military fiefs, territorial dignities, proprietary jurisdictions, hereditary offices; all were descendible to women, and even in some cases partible among them: Shall we suppose that they were incapacitated to inherit unsubstantial distinctions, whose possession would afford them peculiar satisfaction, and which they were abundantly fitted to enjoy? It seems probable, therefore, that personal honours were anciently descendible at common law to heirs general, females as well as males; and perhaps it was on this account that, in the cases of the dignity of Home, and of several others which were granted in Parliament, no line of heirs, for whom they were intended, is defined or expressed in the acts of creation*: None is mentioned even in the case of Hamilton†. Mere titles are not possessions purely masculine, such as males are alone capable to hold; and in ancient times, before 1587, personal dignities implied no privilege of which women were not equally susceptible, and would not

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That of the ancient Earls of Fife was Macduff, but was afterwards changed to Stewart, the surname of the family which succeeded to the Earldom.* See above, p. 76.

That of the Earls of Buchan, from Stewart became Douglas, and from Douglas became Erskine. *See above, p. 90. and note [M.] at the end of the volume.

The surname of the family of Gordon, from Gordon was altered into Seton, and from Seton returned to Gordon. Hawthornden, p. 73.—Pitcottie, p. 48.—Rymer, viii. 539. 540. x. 127. 154. 174. 204. 266. 309. 338. 677.

Sutherland, that of the Earls of Sutherland, was first changed into Gordon, and after some generations was again altered into Sutherland.

* P. 163. above.

† P. 171. below.

be equally ambitious, as men. Precedency, robes, coronets, notice ; these are objects which female minds are rarely found to despise.

In Scotland, the heir of the family, the person who, by a connexion perpetually maintained with the estate, which perhaps in a long series had been possessed by his forefathers, preserved its continuity, always was the favourite of the law. For his aggrandisement, his ancestor, after having contracted any disease which terminated in death, was not suffered even to do justice to those for whose support nature obliges every man who is able to make provision *; and things termed heritable were not disposable there by testament. The same partiality is still shewn to heirs : Men who are perfectly capable to dispose of their property, and who in clear expressions declare their last will about its devolution, are yet laid under both disabilities : And a person allowed to settle, at pleasure, ten millions in stock, is disabled to exert a similar power over a yard square of the poorest heath in Lochaber. Hence it often happens, in fact, that of the same settlement, which has been formally executed in every respect, one part shall be disannulled, while another part is adjudged to be valid. Your Lordship, too, will find lawyers who boast of the superlative wisdom of those inconsistent, perhaps captious, regulations. It was not till 1641 that money, lent on personal bonds at interest, was established among the Scots to be moveable. At that memorable period, distinctions, which had been highly respected before, were brought into contempt ; and, as the blind veneration which had been paid to families, could not miss to be somewhat affected by the leveling

* 15th Nov. 1757, Campbell v. Campbell.

ling spirit of the times, a statute, couched in the most humane terms, was then passed "in favour of orphans, of the fatherless, and of others *:" But, in former days, almost every object, in which the subtilty of lawyers could descry any appearance of duration, was secured to the heir; the idol whom every institution was calculated to aggrandize. Would, then, the representative of the House, who inherited the lands, who enjoyed the authority, and who lived in the castle, the valuable possessions belonging to it, be excluded from any elevation derivable from the personal titles of his predecessors?

The chieftainship was hardly separable from the estate: The influence implied in the former could not be retained by one who possessed not the latter: A woman by whom the lands were enjoyed, if not the chief of her blood, at least the head of her family, could alone be the stay of her kindred and the protector of her clan. Every advantage, therefore, which might either increase her authority or aggrandize her person, would naturally be allowed to her.

The fiefs, which belonged to Lords created in Parliament, were generally erected into lordships either at the time of bestowing nobility on their owners, or after they had been ennobled †. Empty

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* Parl. 1641, ch. 57.—Parl. 1661, ch. 32.

† In 1455, the lands and baronies of Cadyhow, Mauchane, Corfbasket, and Kinneil, were erected by King James II. with the advice and consent of his three estates, into the lordship of Hamilton; and, by the same act, Sir James Hamilton, their owner, was created a Lord of Parliament.—Charter printed from the original in the archives of the Duke of Hamilton.

ty titles, it has been observed, were not such valuable possessions as would be greatly coveted in ancient days. Property, which is something much more substantial, obscuring them, would naturally draw them after it. In a few generations, the different sources from which personal and territorial dignities had flowed would be obliterated, and honours would soon be absorbed in all cases in the estates of their possessors*. It is not likely that such as had originally been personal, ever came to be directly disposable by the persons who enjoyed them, either with or without the fiefs belonging to their owners. But the great number of those which had been derived immediately from lands, the superior antiquity of such as had been acquired in this manner, the ample powers necessarily allowed to be exercised over them by their proprietors; these circumstances, in a country not conspicuous either for accuracy in its reasonings or for precision in its laws, might easily lead men, neglecting to make a proper distinction between two species of dignities in themselves entirely different, to imagine that the same irregularities, remarked to take place in the transmission of titles annexed to fiefs, were not repugnant to the nature of those which had been primarily bestowed on persons. The heir to whom the estate, the valuable object, descended, would naturally assume the appellation which had been borne by his ancestor: No other person would either incline or dare to take it; and indifferent people would not resist a claim in which those immediately interested

In 1488, James IV. with a like consent, united and erected the estates and lordships of Bothwell and Crichton into the Earldom of Bothwell; and, in the same act of Parliament, Patrick Lord Hailes was raised to the title and rank of Earl of Bothwell.—Brief, p. 11. and Appen. I.—Case of the Earl of March.—Index to the acts of Parliament 1581, which erected the lands of Down into a Lordship.

* See note [K.] at the end of the volume.

terested seemed to acquiesce. Personal honours, and the landed estates of their possessors, would thereby incorporate by degrees ; and, mingling together, they would both proceed, in one course, to those heirs, male or female, to whom the dignified estate descended. Hence, instead of being limited indefeasibly to males lineally sprung from him on whom they had originally been conferred, personal titles, no less than territorial dignities, would pass to collateral relations, as if they had been insignificant accessories of his succession, of which they would be deemed component, if not inseparable, particles.

From want of documents, it is difficult at present to distinguish those honours, which were originally personal, from such as were territorial. Hence examples, which are perfectly unequivocal, are not easy to find ; and I shall not attempt to produce any. Little doubt, however, can be entertained, that, on an accurate search, the former would be found, no less than the latter, to have in fact descended before the year 1587 to heirs-female as well as to heirs-male.

In the law of Scotland it was a maxim, That, on the succession of parceners, things which are indivisible went to the eldest of the heiresses. That preference, allowed to seniority, was in some sort necessary. Territorial honours cannot, however, be accurately numbered among things incapable of division ; for fiefs raised to them are partible ; and it has already * been observed, that titles annexed to lands became extinct on the partition of the lands among coheiresses. But personal titles, not being suscep-
tible

* P. 94. above.

tible of division, would naturally descend to an eldest heir-female, and I doubt not that in most cases, in which, in consequence either of a settlement or of a contract, an estate adequate to sustaining their dignity devolved to her, the title will be found also to have been borne by her. In other cases women would seldom choose to be incumbered by a state which they were unable to support.

B O O K

B O O K IV.

Peerages.

P A R T I.

S E C T I O N I.

Alterations made in 1587 on the constitution of Parliament.

MY LORD,

THE cruel fate experienced by James I. seems to have proceeded rather from the visionary credulity and inordinate ambition of his uncle Athole*, than from any violent resentment of his general administration, or settled resolution to give check to his beneficent measures. His innovations were magnificent, but were neither dictated by that puerile species of political ingenuity which delights in impracticable and whimsical projects, nor marked by an excessive and imprudent novelty, which, opposing the habits and shocking the feelings of men, cannot be endured by human passions or imbecillity. A rare philanthropy, impartial

* Fordun, xvi. 27.—Boet. xvii.—Major, vi. 14.—Buchanan, x. 46. 47. 58.—Leflie, vii. 265. 267.—Hawthornden, p. 21. 45. 46.

tial justice, good taste, and superior wisdom; amiable plain vigorous principles, naturally adapted to conciliate affection and to command esteem; formed, guided, and controlled them; and his smart endeavours were not unproductive of grateful effects even on the savage hearts of his barbarians. Bowmaker, Boece, Mair, Buchanan, Leslie, Drummond, Abercromby; all his historians celebrate the mighty reformation wrought, the entire security enjoyed, the happy tranquillity diffused over Scotland during his reign. The design formed against his life was an affair extremely private, in which very few conspirators were engaged: The plot, or rather the assassination, was secretly executed on him by surprise; and the piercing lamentation universally excited among his people by his murder, as well as the severe punishment solemnly inflicted, during a feeble minority, on the potent assassins who had perpetrated it*, demonstrate, that his schemes and their author could not be greatly disrelished or generally odious.

James had not ventured on depriving of seats any of those who had formerly been entitled by custom to sit in Parliament. He did no more than advance a step towards excluding them; and either the design had no sooner been laid than it was abandoned by him, or the extreme eagerness with which his subjects took advantage of the general dispensation granted them in 1427, made it unnecessary to employ much rigour in enforcing a strict observance of the new ordinance. The counties elected not representatives: The commons were not severed from the nobles, or formed into a chamber by themselves: A Speaker was not chosen to preside over them, and to expound their wants: The forms which
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* Major, vi. 15.—Buchanan, x. 58.—Leslie, vii. 267.—Hawthornden, P. 51. 52.

had hitherto been used, continued to be observed, and every freeholder was still understood to be bound as well as entitled to give attendance in the grand council of the nation. In July 1428, a few months after the dissolution of the former convention, another Parliament was convened. In the summons issued for convoking this meeting, all who held lands of the crown, without any exception, were commanded to repair to it; and pecuniary mulcts were then imposed on such freeholders as did not obey the order, perhaps on pretext that they belonged to shires which had not deputed others to represent them; the condition on which leave of absence had been granted by the statute passed in 1427*. Afterwards, during the reign of James II. an unconditional dispensation was granted in 1457 to all whose estates were not worth twenty pounds†, who were not Barons, or who should not be specially required to attend‡. This valuation was raised in 1503 to a hundred marcs, and the dispensation then granted was allowed to Barons as well as to others, but was limited too, like the former, by a condition, that they should send proxies to answer for them||. The royal vassals, whose obtuse faculties were little susceptible of refined pleasures, appear, by authentic records, to have abundantly availed themselves of those ample discharges which from time to time had been given them from their public

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* Preface to the acts of Parl. 1428.

† At present Scottish money is to Sterling money in the proportion of 1 to 12. A penny Scottish is the twelfth part of a penny Sterling: A penny Sterling is a shilling Scottish: And one shilling and eight-pence Sterling makes a pound Scottish. But the proportion varied in different reigns.—See Mr Ruddiman's Introduction to Anderfon's Diplomata.

‡ Parl. 1457, ch. 85.

|| Parl. 1503, ch. 113.

service, and for more than a century before the year 1587 the Scottish Parliament was very thinly attended: But the comprehensive terms still employed in the royal writs on which that convention was summoned, the general titles prefixed to the particular acts of each session, and those very statutes which dispense with their attendance, are full, and even legislative proofs, that the obligation originally imposed by the constitution was held, during the days of the Jameses, to lie indiscriminately on the whole tenants of the King, and that all of them, without any exception, retained, in the reign of Mary, a right to sit in Parliament without election. Accordingly, fines ceased not in 1503 to be imposed for absence, however probable it be that they were not afterwards levied with exactness or rigour. From the infrequency, indeed, with which during a long period the small Barons had been beheld in that assembly, their faces seem to have been almost totally forgotten in it; and any rare appearances unexpectedly made by them in numerous bodies, perhaps after considerable distances of time, would naturally excite surprise and even embarrassment. Their right, however, was never relinquished; and they were wont, at intervals, especially on occasions which interested their passions, to resume their seats in great and formidable numbers. It is certain from such of the rolls, containing lists of the names of the members, as have been preserved, that, after 1467, some Barons and freeholders were present in every Parliament held during the reign of James III. but their number never exceeded thirty: That a few came to the first Parliaments of James IV. never however more than twelve; but that at last, during the remainder of his reign, they ceased to come altogether: That, in the time of James V. they were very unmindful of this duty; yet two or three are still found once or twice to have attended.

tended even during it: And the same negligence was continued during the first years of Queen Mary. But, towards the middle of the sixteenth century, from a sympathy, always contagious, often irresistible, excited by the fervent eloquence and bold sentiments of the first preachers of the Reformation, by the unmerited severity imprudently exercised by the ecclesiastical inquisitors on those heated innovators, and by the splendid intrepidity with which the dreadful punishment appointed by the Church for obstinate heretics was commonly sustained by those primitive sufferers, almost every liberal mind in Scotland had been highly inflamed into a religious indignation at that foppish system, so oppressive of truth, so burdensome in expence, so exorbitant in pretensions, so tyrannical in discipline, which, under the imposing name of the Catholic Religion, had maintained, during many ages, an uncontrolled and presumptuous authority over Europe; and a mighty inundation of men, whose force was resistless, poured from all corners of the country into that determined Parliament which was assembled in August 1560, during the absence of the Queen, to consult about reforming, or rather to abolish and to proscribe its superstition and its abuses. Besides the Nobility, the Bishops, the Abbots, the Priors, and the Burgeses; Ker of Cessford, Maule of Panmure, Wallace of Craigie, Ker of Fernihurst, Murray of Tullibairden, Douglas of Drumlanrig, Johnstone of Johnstone, Stuart of Gairles, and many other Barons, who were not noble, but were descended of the first families, and possessed of the largest fortunes in the kingdom, and along with them a vast number of inferior freeholders, flocked to that important convention *. Their great and unusual multitude, congregated to give a

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decisive

* Keith, 146. 147.—Spotswood, p. 149.—Parl. 1567, ch. 3. 4. 5. 6.

decisive weight to their resolutions, possibly at first sight produced astonishment, perhaps confusion: The commons, probably on that account, before taking their places, explained, in a petition presented to the Lords, their pretensions to seats; and their right was unanimously admitted. This remarkable incident has entirely escaped the notice of every contemporary historian; a proof, that the claim of the freeholders did not carry even the appearance of an innovation. Randolph, however, the English resident, accustomed to a Parliament differently constituted, transmitted to Cecil a copy of their petition, in which it is amusing to observe them, among other topics, insisting, in a high tone, That statutes, which they had not been required and suffered to reason and to vote at making, should not bind them. "The matters," says he in his letter, "concluded and past by common consent on Saturday last, in such solemn sort as the first day that they assembled, are these: First, That the Barons, according to an old act of Parliament made in the time of James I. in the year of God 1427, shall have free voice in Parliament. This act passed without any contradiction *."

On this footing matters remained till, in the year 1587, a plan, in most articles similar to the model which had been proposed by James I. was at last carried into full execution. The right, which lands had formerly given to seats in Parliament, was then taken from them: Representation was introduced: And it was established, that thenceforth no commoner should sit in that assembly, unless elected a member of it. Two freeholders, of good rent and of fair character, their charges † to be defrayed by those who at their

* Robertson, Appendix No 4.

† In 1641, their charges were fixed at five pounds Scottish, or eight shillings and four-pence

their expence should be relieved from attendance, were ordered to be chosen annually to serve for each county, (except Clackmannan and Kinross, which were allowed to send only one a-piece); and the qualifications required in the persons entitled both to elect and to be elected commissioners of shires, were defined. The dignity of the fiefs, belonging to those on whom voices and eligibility were bestowed, was not considered in the affair, but the value of their freeholds, and the superior lord of whom their property was held. Both privileges were confined to commoners. Noblemen, not being discharged from the obligation under which they had hitherto lain of attending Parliament, continued still bound, in consequence of their nobility, to perform that service; and, on this account, it was unnecessary to declare them ineligible. But they were expressly excluded from a suffrage in choosing representatives of counties; and it was enacted, that every resident freeholder, in degree inferior to a prelate or to a Lord of Parliament, who owned lands, held of the crown and possessed of the valuation required by law*, should be entitled to vote in electing them. Tenements, erected into honours, were not distinguished in this particular from others, or privileged more than those inferior in denomination. Their legislative quality was taken indiscriminately from all lands; and it was fixed, that noble fiefs, no more than ignoble ones, should in no case confer independent and hereditary seats†.

S E C T.

four-pence Sterling, for each of the days which a session lasted, and of those allowed to the members, before its commencement and after its conclusion, for coming to Parliament and returning from it.—Parl. 1641, ch. 18.—Parl. 1661, ch. 35.

* A forty-shilling land.

† Parl. 1587, ch. 114.—Parl. 1597, ch. 276.—Parl. 1661, ch. 35.—Parl. 1648, ch. 2.

S E C T. II.

Effects produced on noble Honours by the alteration made on the constitution of Parliament in 1587.—Introduction of Peerages.

IT is not impossible to pronounce on the motives which might induce James I. to alter the constitution, to extend the deliberations, to lengthen the sessions, and to increase the frequency of Parliament. An ingenuous, able, patriotic, polished prince, who compassionated the miserable condition of his poor commons, who was eager to subdue the unruly tyrants that lorded over them, and who was solicitous to civilize both, would wish to give regularity, vigour, dignity, and respect to government: And if principles alike generous shall be supposed to have engaged James VI. to adopt a measure which had been approved by the wisdom of his predecessors, a compliment, neither contradicted by the history *, nor disavowed in the preamble of the statute which established it, will be paid to his heart, without any impeachment of his understanding. But those who, amidst a vain affectation of uncommon depth, insist that, deprived, in consequence of the Reformation, of the valuable support which in former times the crown had derived from the spiritual estate, his only view in introducing the small Barons into permanent seats was to reinforce the royal influence in Parliament against the increased power of the Nobles; at the

* Spotfwood, p. 366.

the same time that they betray great ignorance of the real state of landed property in Scotland, inspire also, amidst a contrary intention, a mean idea of James's political discernment; and even lessen any favourable sentiments, which otherwise might be formed, of the kind affections entertained by him towards that numerous body which a humane man will readily allow, from their hard lot, to possess a primary claim, in every nation, to sympathy, to indulgence, and to protection. Before the Reformation the Popish clergy, in consequence of the engagements contracted by them at being invested with the sacred character, owed canonical obedience to the supreme ruler of the Church; a foreign potentate, resident in a distant country, and different from the chief governor of their own: The Sovereign, as well as the protector, of every individual belonging to his order, perhaps a firmer allegiance was preserved by the dignitaries to that universal bishop, with whom they were more closely connected by a direct subordination, than by their inferiors, who were immediately subjected to their proper ordinaries. Those raised to prelacies not only regarded with a fond admiration the sublime tiara, whose irradiations reflected much lustre on their mitres, but looked continually to the Roman Pontiff for richer fees, red hats, Papal commissions, legantine powers, and other * favours; and, in consequence of the profound veneration in which the infallible Father was held all over the Christian world, preferments might easily be either forwarded or obstructed by his high interposition, even in cases in which his apostolic office did not entitle him directly to interfere. The Scottish Kings claimed, and, after some struggle, I believe at last obtained, a right of nominating to the vacant bishoprics in
their

* Parl. 1424, ch. 28.

their dominions. But their right was not in itself perfect. Their nomination, besides being controllable by forms, was required ultimately to be confirmed by the Holy See, without whose approbation and even authority investiture and consecration could not follow upon it*. Abbotships, too, and Priorships, instead of being at the Royal disposal, were commonly conferred either by their proper monasteries or by private patrons; and it appears not to have been uncommon of old to make application at the court of Rome for benefices disposable as well as situated in Scotland†. Hence, instead of being fervently devoted, the dignified clergy, all over Europe, often created or fomented, before the Reformation, violent oppositions to their native Sovereigns‡: And it is only since their promotion became entirely dependent on the crown, that they can form just pretensions to that humility and that diffidence with which men, high in rank and independent in fortune, are sometimes observed, in public life, to resign their understandings and their voices to the fuller information and superior wisdom of administration and of favourites.

It could not therefore be to repair the loss of a support, on which neither himself nor his predecessors could rely with assurance, that James revived the law which had been passed in 1427. The Protestant bishops, rendered by the new establishment more dependent than the Popish prelates had been, still represented one of the
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* Parl. 1483, ch. 111.—Parl. 1493, ch. 64.—Parl. 1540, ch. 107.—Rymer, ii. 816.

† Parl. 1427, ch. 119.—Parl. 1471, ch. 54.—Parl. 1481, ch. 103. 104.—Parl. 1483, ch. 107. 111.—Parl. 1493, ch. 63. 64. 65. 66.—Parl. 1496, ch. 86.—Parl. 1540, ch. 100.

‡ Buchanan, x. 38.

three estates in Parliament *: And if the Royal influence had on the sudden suffered a considerable diminution from the decreased weight and reduced number of the spiritual members, a wise minister would never have attempted to preserve or to recover it by a numerous reinforcement of unlettered and turbulent Barons. Among the commons many individuals were found, whose estates were as extensive, and whose followers were as numerous, as those almost of any nobleman in the kingdom; and more disturbance had never been created to the King, greater violences had never been committed in the country, by the nobles, than had often been excited by commoners, who indeed will generally be found to have borne a principal part in all the outrages of their times. After the new model was established, the small freeholders would not incline to be subjected by election to a burden, from which, on account of its grievousness, they had lately solicited to be relieved; and if any of them should be ambitious of that honour, now rendered precious by its rarity, they could hardly entertain any hopes of arriving at it. The service of attending Parliament would be devolved, all over the country, on persons whose fortunes were adequate to the expence of it, who would be little connected even by approximation with the crown, and who would in all probability prove exceedingly unmanageable, as their number rather exceeded, their consequence was scarcely less, and their pretensions would not be inferior to those of the nobles. The chief employments of state had always been conferred indiscriminately on both orders. The first Lord High Treasurer of Scotland is reported to have been Sir Walter Ogilvy †: During the minority of James II. Sir Alexander Livingston was

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appointed,

* Parl. 1584, ch. 3. 20. 5.—Parl. 1587, ch. 29.

† Crawford's Officers of State, p. 356. 357.

appointed, by a convention of estates, governor over all the realm ; and Sir William Crichton was approved by them Chancellor of the kingdom* : Both this office and that of Secretary were in 1587 enjoyed by Maitland, a commoner, who had also held the Privy Seal immediately before the custody of it was given to the famous poet George Buchanan : His elder brother, the Maitland of Lethington, so highly celebrated by all the writers of his age, had been principal Secretary under Queen Mary. James, therefore, by obliging a considerable number of the wealthiest freeholders to attend regularly in Parliament, was only bringing on himself an additional number of importunate suitors, whose avidity it should not be in his power to satisfy ; and, at the taking of that step, it must have been apparent to his counsellors, that he could not depend upon them for any effectual support against the aristocratical influence of the nobility. Consequences, in themselves evident, could not escape the discerning spirits of those times. The first minister, Maitland, a penetrating genius, would unquestionably descry them. It is well authenticated, that the measure was supported by the commons, but opposed by the nobles ; and, as the collective authority of the latter order was extremely feeble, compared with the united force of the former, the Barons would neither have approved of the alteration, nor have suffered it to pass into a statute, had they apprehended it to be derogatory to their dignity.

In those days men were exceedingly ignorant of some advantages, to which experience has taught their enlightened posterity, that seats in Parliament may be converted. The small freeholders,

* Pitfcottie, p. 2.—Hawthornden, p. 55.

ders, in consenting to the law, imagined that they were obtaining a discharge from a burdensome and unprofitable service. The rich Barons, who were able to bear the expence, foresaw, that, in consequence of the seats to which they were generally sure of being elected, they might be considerably distinguished above their rank, and, if not set entirely on a level, should at least be approached nearer to their superiors. The nobility did not relish an indulgence, which was not extended to their body; and knowing that, as long as the doors should remain open to every person who wished to enter them, the House would seldom be crowded, but that numbers and wealth should give the phalanx which was going to be introduced much weight, apprehended that their influence or dignity should consequentially be diminished. And the crown, which, not being provided with any regular force immediately dependent on the King, seems always in Scotland to have peculiarly dreaded mighty convocations of people; at the same time that authority was acquired to Parliament, and that regularity was introduced into government, expected, by fixing the number of representatives of counties, to be secured against those tumultuous meetings caused by inundations, such as had been made at the first establishment of the reformed religion in the year 1560. It would, perhaps, be an excessive refinement to suppose, that James's ministers foresaw, (for at that early period of life James himself, amidst the reputation for kingcraft which was so fondly affected by him, could scarcely foretell) that the nobility, discovering themselves to be more closely connected by the new constitution with the Sovereign than any other order in the nation, would speedily become more devoted to the crown than they had been during the former periods. Probably the remote consequences, which should ultimately follow from that ordinance,

were not fully perceived by all the members affected by them ; but assuredly many of them would be foreseen by several both of the commonalty and of the quality ; and those, who would penetrate the views which James's council had in establishing representation, must look to the effects which were actually produced by it.

First, After the year 1587 honours passed not, on the alienation of the lands which had been raised to them, along with the fiefs, from the former owners to the new acquirers. A commoner, on purchasing, or even on succeeding to an estate erected either into an earldom or into any other dignity, did not become noble, or acquire an inelective right to sit in Parliament. He acquired, however, a title to be chosen, and to vote in choosing, a representative of his county : And that was all he acquired.

Secondly, Lands belonging to commoners, on being formed either into lordships or into higher appellations, altered not the rank of their proprietors, and did not give them either titles or seats. Their owners remained entitled to sit only on election : And another act, bestowing both upon them, or creating them Peers, was necessary to confer that high and independent privilege*.

Thirdly, A Peer, on alienating or losing either the whole or a part of his estate, noble or ignoble, did not lose his nobility, but continued, notwithstanding that alteration in his circumstances, both to possess his dignity and to sit in the national council.

Fourthly,

* Parl. 1592, ch. 121.

Fourthly, Lands, either which belonged to noblemen at the time of their creation, or which were acquired by them after it, were not thereby affected in denomination. A barony, belonging to a person who was created an Earl, did not become an earldom; but a further and a different act, erecting fiefs into honours, was required to render them noble.

The year 1587, therefore, is a grand æra in the parliamentary history of Scotland. The hereditary inelective seats which the Lords, excepted by statute from the innovation then made on the constitution, had alone been permitted to retain, were rendered absolutely independent of lands. The noble honour, or rather the high privilege, which formerly had often been united to fiefs, was entirely disjoined from them; and as dignities, disannexed from lands, must be personal, all nobility was transmuted, in consequence of this disjunction, into states or qualities of the persons merely of those who inherited or were elevated by it.

In 1587, all honours were rendered personal,

Its nature, too, or the rights implied in it, were essentially affected by that alteration. Till 1587 honours, both the personal and the territorial, had been no more than a tinfelled species of private property, stiles to wit or titles, which implied rank or precedence: But they were then transformed, from empty names and vain appellations, into parliamentary dignities and important stations of public trust, which vested exclusively in the individuals distinguished by them a right, independent of property and disconnected from it, to sit in Parliament without election.

and transformed into proper peerages,

Thus, in 1587, a superior order, hitherto unknown in the constitution, was instituted in North Britain. During the preceding period

period every freeholder, considered in his legislative capacity, no less than every nobleman, had in effect been a species of Peer, or rather the eminent dignities properly termed Peerages had not been introduced into Scotland : But in that year those possessed of nobility were elevated into hereditary lawgivers, and born counsellors of the people and of the crown in the high court of Parliament, or were created just and proper Peers, in the sense in which this word is now understood ; and the lofty privilege, for which this state is chiefly valued at present, was then rendered peculiar to their exalted degree.

P A R T II.

Rules, by which Peerages became descendible after
1587.

S E C T I O N I.

After 1587, Peerages were Estates not devisable, but strictly entailed.

strictly entailed,

THIS grand alteration could not but be productive of important consequences on the legal descent, as well as the essential nature, of honours. Those annexed to fiefs might anciently have been

been transferred by deed, and devised by their owners : Few personal dignities seem to have existed in Scotland before the year 1587 ; and on this account, as well as from their inferior value *, perhaps more than from analogy, which here is very imperfect, a like power was suffered to be exercised over them also : But, in 1587, all noble honours, having become parliamentary dignities and legislative trusts, ceased to be transferable or devisable †. The laws, therefore, by which their descent had been governed in former times, could no longer be applied to them : A new system, in material articles different from the old, was required or introduced to regulate their succession ; and the rules which compose it can be rightly derived only from the new nature acquired by them in that year, or be referred for their commencement and for its consequences to that epoch.

Lands and honours, which in ancient times had often been incorporated, were formed, in 1587, into estates entirely different from each other ; and these dignities, instead of accessory, subordinate, or hanging on others, were then rendered rights, in themselves principal, sovereign, and distinct, which had elevated privileges depending wholly upon them. The descent, therefore, of Peerages, could no longer be influenced by that of any fiefs belonging either to those possessed of them or to others ; and as they were rights in their nature too precious, and in their object too high, to be in the disposal of the private persons who enjoyed them, Peerages became, in 1587, a sort of estate strictly entailed, neither attachable by creditors, nor acquirable by purchasers, nor disposable by their possessors, but descendible only to those appointed

* L. 21. ff. de reg. Jur.

† Durie's Decisions, 11th July 1633, *Oliphant v. Oliphant*.

pointed to succeed to them at common law, in the ordinary course of that species of inheritance.

The disability under which their possessors were then laid, to dispose of them, extended to persons descended of the blood which had originally been ennobled, as well as to aliens from it. The right of those called to inherit them was indefeasible; and their succession could not be frustrated by any anterior possessor. Each heir, on his existence, had in himself an estate, which in his proper turn he was entitled to obtain, independent of the will of his ancestors, in consequence of the grant understood to have been made by the crown directly in his favour.

For example: A Peer, who held an ancient Earldom in fee simple, and who had several children, might, after 1587, settle his estate either on a younger son, on a daughter, or on any series of heirs agreeable to his inclination; and the person, called by that settlement to succeed, might take the lands devised under it, with the proprietary jurisdiction and the feudal privileges annexed to them: He would not, however, on succeeding to the noble fief, obtain the dignity which had anciently been united to it, but would still remain a commoner, and might even be entitled, on the Earldom itself, both to be elected and to vote in electing a member of the Parliament of Scotland, or of the House of Commons. The eldest son, too, or the natural heir, might thereby be excluded from a substantial part of his expected inheritance, but could not be deprived of the Peerage: Though stripped of his patrimony, he would retain his hereditary and distinguishing prerogative, either to sit in the Scottish Parliament without election, or to vote in choosing and to be himself chosen one of the noblemen,

men, eligible by the treaty of union, to represent the Scottish Peers in the parliament of Great Britain. A similar settlement, in like circumstances, would have had very different effects before the year 1587; a clear proof of the mighty change produced by the statute then enacted.

S E C T. II.

After 1587, Peerages were descendible only to Heirs-male.

THE new course in which honours were caused by that act to descend, would take a direction conformable to the nature then assumed by them: And a feminine possession, held before 1587, of any dignity, especially a territorial dignity, probably will now be confessed to be totally insufficient to establish that the Peerage either is at present, or since 1587, has been feminine; because, during the preceding period, every noble title, derived from the feudal denomination of a dignified fief, was descendible to heirs general.

and descen-
dible only to
heirs-male

A plain person, who reflects on the capital right implied in them, will readily pronounce that dignities, whose essence consists in conferring inelective seats in a legislative assembly of which men are alone permitted to be members, must be intended only for males: Every grant, which is either couched in expressions that are not in themselves determinate, or whose terms, not being

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reduced

reduced into writing, can only be gathered by imagination from conjecture, ought to be explained in a sense agreeable to its object. Those who, to account for the exclusion of females, assert, that from Nature the apprehensions of women are not equally quick, that their fancies are not equally lively, that their judgments are not equally correct, that their hearts are not equally benevolent, and that, with like advantages, their sentiments would not be equally just as those of the men, cannot have been fortunate in their acquaintance, or, perhaps, their understandings are limited by an astringent narrow conceited pedantry. But—without a severity of study, a fulness of knowledge, and an intenseness of thought, of which the offices females are pleased, as well as destined to perform, seem scarcely to admit, distinct and enlarged opinions cannot be attained on the involved and thorny matters which must often be discussed in national councils: The course of education, which, being supposed most adapted to qualify for discharging those functions, has generally been reckoned proper for the sex, is little suited to the perfect attainment of those clear and accurate conceptions: The habits, as well as notions of life, which thence are commonly contracted by women, tend rather to create in them an indisposition, than to excite a passion towards political labour and disquisitions: And duties essential to the preservation of society often disable them to endure fatigue, and to stir from home. The unembarrassed confidence, too, acquired by frequent appearances in crowded theatres, the intemperate agitations into which public speakers are often thrown, and even the masculine faculty of delivering long orations with force or with composure in a mixed assembly, might wholly divest them of those principal charms; modesty, softness, delicacy; which contribute so powerfully towards inspiring love and preserving affection. Their presence,

fence, also, should engage the attention of the men from other objects, to a contemplation of their beauty; and places at which the sexes should intermingle, instead of grave conventions for the serious discussion of interesting business, might degenerate into scenes of frivolousness, of gallantry, and even of corruption: Or the keen contentions, ever ready to arise among spirits stimulated with ambition, might sometimes be inflamed between them into unnatural, but pointed oppositions, inimical to that intense and enthusiastic, yet sweet and tender passion, whose fond devoted anxious sentiments constitute a pure and a high delight of every warm ingenuous elegant mind. On these pretexts, or perhaps by the strength and the arrogance of the men, an equal half of human kind have been excluded in most nations, in America as well as in Europe, from taking any part, either deliberative or decisive, in meetings held to consult about general laws, about national imposts, or about other public measures, by which their conduct must be governed, their property is affected, and their liberty is restrained; and in Scotland, votes in these assemblies have always been confined to males. The Peerages, therefore, which, for those sole purposes, were created in 1587 out of the noble honours anterior to that year, must now be descendible to men only, by whom the illustrious privilege implied in that elevated condition is alone exercisable; and, agreeably to the strict interpretation put by law on all patents by which high public trusts are conferred, these masculine fiefs must be limited to heirs-male, for whom alone they can be presumed to have then been intended.

Hugh Lord Frazer of Lovat died in 1697 without male issue; and, on his death, the title of Lady Frazer of Lovat was assumed by his eldest daughter, Æmilia Frazer. Simon Frazer of Beaufort,

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grandson

grandson of her great-great-grandfather, the Lord Frazer of Lovat who died in 1646, was heir-male of that family, and in this character claimed, in the Court of Session, the honours from her son, Hugh Mackenzie of Frazerdale, the heir general, who, after his mother's death, had taken possession of them. The pretensions of both parties were not less ably maintained by their counsel, than attentively examined by the judges in Scotland: The learned papers, written in that interesting suit, are the principal source of the whole erudition, which after minuter researches has been more pompously, and perhaps more correctly, displayed in subsequent cases: And in 1730 that supreme court, after a full and accurate investigation, pronounced a decisive judgment, on general principles, in favour of the heir-male *. In that judgement Mr Mackenzie acquiesced: Simon Lord Frazer of Lovat possessed the Peerage during his life, and his right was recognized by all the branches of the British legislature. In 1746, under the title of Simon Lord Frazer of Lovat, articles of impeachment were exhibited against him by the House of Commons, for accession to the rebellion raised against his late Majesty George II. He was tried by the House of Lords as a Peer. Lord Hardwicke, the excellent Chancellor, was created by the Sovereign Lord High Steward to preside at that trial; remarkable, besides other things, for affording us, alas, almost the only genuine monument of those vast powers, of

July 3. 1730.

* The court decerned and declared "the title, dignity, and honours of Lord Frazer of Lovat, to pertain and belong to the said Simon Lord Frazer of Lovat, pursuer, as eldest lawful son of Thomas Lord Frazer of Lovat, his father, who was grand-uncle to Hugh Lord Frazer of Lovat, deceased, father of the said Mrs Æmilia Frazer, and grandfather of the said Hugh Mackenzie, defender, and, consequently, as heir-male of the family of Lord Frazer of Lovat, to whom the said title and dignity does descend."—Sup. Case, p. 19.—Ad. Case, ch. 6. p. 95.—Brief, p. 39.

of which but a feeble conception can be formed even from that admirable discourse *: And on Lovat's conviction, the cruel punishment, which his Lordship had been condemned to suffer, was commuted by the mercy of the crown into decollation; a distinction commonly granted to nobility.

S E C T. III.

After 1587, Peerages were limited to Heirs-male of the Body of the Person first ennobled.

PERSONAL Honours, not saleable for money, nor attachable for debt, nor devisable by the individuals who hold them, but appointed to descend in an unalterable course, must necessarily be annexed to blood. In 1587, the pretensions which any person could form to them were made to depend entirely on lineage, and blood became the only canal by which they were transmissible from one possessor to another. The blood required to convey them could not be any species, however poor or mean, of that fluid. A sort richer than ordinary could alone possess fineness sufficient for a vehicle employed to carry or to sustain nobility. Blood connected directly with the dignity, or which established in the claimant an immediate connexion with the former possessors of it, could alone perform that office. The blood of a man who was not sprung from them, not being a stream of that which had issued from their hearts, nor differing in purity from the gore

of the body
of the person
first ennobled.

of.

* Lord Lovat's Trial, p. 165.

of the vulgar, could not give a claim to their honour. Noble blood was required to constitute nobility ; and a person, in whose body none of that sublimated kind flowed, could not be a nobleman by descent. Forgive me, my Lord : Jurisprudence, whose primary assumptions a philosophical inquirer will often discover not to differ materially from the crude sentiments of the mob, must sometimes descend from its accuracy, and, in adopting the insolent language, may seem also to approve of the nonsensical ideas of pride and of folly. After 1587, every man who claimed a peerage by inheritance was obliged to be descended either immediately or mediately of the person on whom that dignity had originally been conferred, otherwise plebeian blood alone ran in his veins, and his birth could not be noble. In that year, therefore, those personal peerages, into which the ancient honours had all been transmuted, became descendible only in the right line, and were limited to heirs-male sprung from the person first ennobled. His kinsmen, his brothers, his parents, had not been nobilitated ; and without express words a nomination, made by the King in his Royal capacity, to a station high in rank, in its nature public, and important to the state, which without great impropriety may be termed a trust or an office, cannot be extended either to ascendants or to collaterals, into whom his blood can never pass.

I pretend not that no instance can be produced, in which, after 1587, noble honours descended to heirs general ; but am persuaded that, for one example in which they went to heirs-female, three will be found in which they devolved to heirs-male* : A tolerable proof of the established rule. It even began then to be common

* See note [L.] at the end of the volume.

common for noblemen, who foresaw that, in consequence of the alteration made on the condition of nobility, their estates and their titles might afterwards go to different persons, to alter former settlements by which their lands stood devised to heirs-female, and to settle them on heirs-male.

John Stewart Earl of Athole, to whose great-great-grandfather that Earldom had been granted by his brother James II. died in 1594 without male issue; but he left four daughters. The peerage, however, did not descend to any of them: It became extinct. Dorothea, his eldest daughter, married William Murray Earl of Tullibairden: Mary, the second daughter, married James Stewart, eldest son of John Lord Innermeath; and, in 1595, James VI. created John Lord Innermeath (whose son James had married Mary the second daughter) Earl of Athole, and bestowed upon him a grant of the estate, both lands and dignity, limited to John the original patentee, and to the heirs-male of his body. The peerage was accordingly enjoyed by him during his life, and from him descended to his son James; but, on James's death without issue, becoming again extinct, John Murray Earl of Tullibairden was created Earl of Athole by Charles I. in 1629*.

The lordship of the Byres belonged to a family, remarkable in early times for the fervour of their zeal about the reformation of religion, for the warmth of their attachment to every image of liberty, and for the steadiness of their adherence to those measures which

* Mackenzie's Cond. p. 4.—Lovat's Answers, p. 6.—Lovat's Remarks, p. 14.—Charter, 5th March 1595, (B. 61. No 19.)—Charter, 17th Feb. 1629, (B. 52. No 39.)—Sup. Case, p. 19.—Ad. Case, ch. 6. p. 104.—Brief, p. 123.

which they supposed would promote them. John Lindsay, Lord Lindsay of the Byres, died in 1608 without male issue, and on his death the peerage devolved not to his daughter Anne, but to his brother Robert *.

In 1640, Robert Boyd Lord Boyd, a man learned, accomplished, and elegant above his age, died without issue; but he left five sisters, whose descendants still exist, and are numerous. The peerage, however, went to his uncle James Boyd, and remained with the heirs-male of his body till William Earl of Kilmarnock was attainted of high treason in 1746 †.

In 1581, the Earldom of Lennox was erected by James VI. into a Dukedom, in favour of Esme Stewart Earl of Lennox, a near kinsman as well as great favourite of that King. His great-grandson, Esme Duke of Lennox, died in 1660 without issue, and on his death that peerage descended not to his sister Lady Mary Stewart, who was both a grandchild of the famous Villiers Duke of Buckingham, and married to the eldest son of the first Duke of Ormond, but to his cousin Charles Earl of Litchfield. On the death of Charles Duke of Lennox without issue in 1672, the dignity went not to his sister Lady Catherine Stewart wife of Lord Obrien, but merged by descent in the crown ‡.

James

* Sup. Cafe, p. 18. 29.—Ad. Cafe, ch. 6. p. 92.—Brief, p. 130.—Lovat's Mem. p. 10.—His State of Instances, p. 5.—Mackenzie's Answers, p. 11.

† Mem. for Lord Lovat, p. 15.—Mackenzie's Answers to it, p. 16.—Lovat's State of Instances, p. 7.—Sup. Cafe, p. 17.—Ad. Cafe, ch. 6. p. 93.—Brief, p. 132.

‡ Lovat's Ad. Cond. p. 20.—Sup. Cafe, p. 26.—Ad. Cafe, ch. 6. p. 112.—Brief, p. 137.

James Stewart Lord Down, eldest son of Alexander Earl of Murray, one of the principal Secretaries of State during the reign of James VII. died before his father, leaving two daughters, whose descendants are still in being. The peerage however, on the death of Alexander in 1702, devolved not to either of them, but went to their uncle Charles, and on his death without issue, to his brother Francis, whose grandson is now Earl of Murray *.

Murray.

Francis Forbes Lord Forbes, who in 1730 had succeeded his father William Lord Forbes, died during his nonage in 1734 without issue, but had two sisters, Jean-Maria and Elifabeth, who survived him, who were both married, and whose children still exist. The peerage, instead of descending to any of his sisters, went to his uncle James Lord Forbes, father of the present Lord.

Forbes.

John Lindsay, the gallant Earl of Crawford, whose elegant manners are still remembered by many, died in 1749 without issue, but was survived by two sisters, Catherine and Mary, of whom, Mary, has children. The peerage however descended to his heir-male, a distant cousin, George Lindsay Viscount of Garnock, whose son is now Earl of Crawford.

Crawford.

The money, owing in the last century by the Earl of Caithness, amounted to more than a million of marcs; an amazing sum in that remote county, in which a fowl is still sold for three-pence. On the Earl's death in 1676, Campbell of Glenorchy laid claim both to the honours and to the estate of that family under a conveyance, a charter, and a feisin, by which, in conse-

Caithness.

C c

quence

* Lovat's Ad. Cond. p. 13.—Sup. Cafe, p. 20.—Ad. Cafe, ch. 6. p. 107.—Brief, p. 137.

quence of a transaction concluded between them about satisfying the creditors, the peerage as well as the Earldom had been made over to him. Campbell's pretensions were obliged in those disorderly times to be maintained by force of arms against the clan of the Sinclairs, who were generally attached to the lineal heir of the ancient proprietors: And, in order to assert them, Glenorchy, (a favourite who had furnished a thousand and seven hundred men to that savage host, which, in 1678, was detached by a violent administration to lay waste the peaceful habitations of the harmless enthusiasts in the western shires of Scotland *,) having marched with his followers, reinforced by a company of Highlanders in the pay of government, from the Banks of the Tay beyond the extremity of Sutherland and the promontory of the Ord, a battle, still celebrated in Breadalbane and in Caithness, was fought in 1680 at Oldimarlack, in which victory declared in favour of the Campbells, and they obtained peaceable possession of the lands, to which their pretences were seemingly unquestionable †. Most of the gentlemen, at present possessed of any parts of that Earldom, derive their right from Glenorchy, by whom too the title was assumed. But the Privy Council ‡, under authority of a reference made to it by parliament ||, found that George Sinclair, heir-male of the last Earl, had a right to the dignity. On his death without male issue in 1698, the peerage devolved not to his daughter, but to John Sinclair of Murkle, his collateral heir-male, from whom it was transmitted to Alexander his

* Burnet, ii. p. 184. on year 1678.—Hume, ch. 66.

† Papers and proof in a cause brought in the Court of Session about 1748, the Hon. Francis Sinclair v. George Sinclair of Ulbster.

‡ Fountainhall, i. 115. 148.

|| Index to the acts of Parl. 1681.

his eldest son *. In 1767, Alexander Earl of Caithness died, leaving an only child, Dorothea, wife of James Earl of Fife; and his landed estate, in consequence of a settlement which had been executed by him, went to another family. Neither the Countess of Fife, nor the owner of the lands, even entered a claim to the peerage, but it was adjudged by the house of Lords in 1772 to have descended to the heir-male, William Sinclair of Rattar, whose son is now Earl of Caithness: Precedents, if compared with a former † brought from the same house, demonstrative both of the great alteration made in 1587 on the laws of succession to honours, and of the total disconnection then effected between them and lands.

In 1762, a competition arose between William Douglas Earl of March, and Sir Thomas Kennedy, about the honours and dignities of Earl of Caithness and Lord Kennedy. The former was heir general of John Kennedy the last Earl of Caithness, who had died without issue in 1759: But the latter was heir-male descended of the body both of David the first Earl of Caithness, and of Gilbert the first Lord Kennedy ‡: And on this ground, after a full consideration, judgement was given by the House of Lords in favour of Sir Thomas Kennedy ||.

Caithness.

Jan. 27.
1762.

C. c 2

The

* Case of William Sinclair of Rattar, exhibited to the House of Lords in 1772, on his claim to the peerage of Caithness.

† P. 113. above.

‡ P. 163. above.

|| "Adjudged, That Sir Thomas Kennedy has a right and title to the dignity of Earl of Caithness, as heir-male descended of the body of David the first Earl of Caithness; " and

Borthwick.

The general principle was again established in a case still later than the preceding. In 1762, Henry Borthwick, a male descendant of the first Lord Borthwick, claimed the title and the dignity, which, on that account, were adjudged by the House of Peers to belong to him *.

S E C T. IV.

Were Peerages limited after 1587 to Heirs-male descended of the Noblemen who possessed them in that year?

Are those Peerages, which arose out of territorial honours, limited to heirs-male descended of the noblemen who possessed them in 1587?

THE foregoing cases, in which both an heir-male and an heir general existed to claim the succession in those characters, and in which the Peerages devolved to the former in preference to the latter, seem abundantly to establish, "That those honours, which" "were introduced into Scotland in 1587, are now limited to" "heirs-male descended of the person first ennobled." But must the heir, entitled to inherit a Peerage, be sprung from the Lord in whom the dignity was vested at the great revolution then produced on the constitution; or is it sufficient if he derive his lineage

"and also has a right and title to the dignity of Lord Kennedy, as heir-male descended of the body of Gilbert the first Lord Kennedy."—Gordon case, p. 3.—Sup. Case, p. 19.—Ad. Case, ch. 6. p. 108.—Brief, p. 41.

* "Adjudged, That the petitioner hath a right to the title, honour, and dignity of" "Lord Borthwick, as heir-male of the body of the first Lord Borthwick."—Gordon Case, p. 3.—Sup. Case, p. 19.—Ad. Case, ch. 6. p. 96.—Brief, p. 46.—See also note [L.] at the end of the volume.

age from that person on whom the rank of Nobility had originally been conferred? A question, which appears not to have ever been proposed by any lawyer, and which, I suspect, applicable precedents cannot be found to determine, possibly, on that account, will be hastily affirmed by some to be perfectly clear. Others, whose minds accustomed, before pronouncing, to examine objects with care, and, after examination, to discover real truth to differ widely from first appearances, are inclined rather to scepticism than to precipitation, may perhaps perceive a difficulty in resolving it. In jurisprudence, a science strictly logical, your determinations ought all to be deductions exactly consonant to principles, without which decisions will never be either steady and uniform, or just and impartial: And, amidst the hesitation which must distract the understanding at forming an opinion on a point entirely new, perhaps plausible arguments are not wanting to excite a doubt, whether at present it be enough to give a good right to any peerage, which was originally territorial, that he, who claims it, trace his lineage from the person who was owner of the fief at the time of erecting it into a dignity.

The rules which govern Peerages in their descent are very different from those which regulate succession to lands; and the terms, employed to direct it, are interpreted in their case much more strictly than the same expressions are in the case of fiefs: Otherwise honours could never become extinct as long as any heir, collateral, ascendent, or descendent, of the first person on whom they had been conferred, continued to exist, unless the deed bestowing them contained a condition specially providing, that, in default of those called by it to inherit them, they should merge in the crown. An estate granted to a man, either with or without a
substitution

substitution of others to succeed after him, to heirs-male only as well as to heirs general, remains with his heirs, as long as any are found in existence to exclude the King, the last heir, who is never entitled to take till every person inheritable by law is extinct. But Peerages, not being property, are more confined in their descent, and go not to any heirs indefinitely, without exception or limitation. The words in which they are granted are regarded; and those conferred on heirs-male do not, in their default, devolve, like landed estates conveyed in the same terms, to heirs-female. A grant, made expressly in favour of a person who aspires to a Peerage, is required to give a right to it. Does it not follow, that those who produce words, perfectly full, and absolutely unambiguous in every title, as well as directly applicable to them, are alone entitled to take an honour by inheritance, and that grants of Peerages, explained as they are in a limited and unusual meaning, contrary to their plain tenor and common import, must be understood in the strictest sense possible to be put on the expressions used in them? otherwise, on what pretext are they limited at all?

In ancient times, the nobility of a man, whose exaltation was derived solely from that of his property, depended entirely on his connection with it. The moment he was divested of the ground which had been raised to honour, every right annexed to that ground, among others the dignity, departed from him; and after being deprived, he could not transmit either to his descendants, or to his collateral heirs, a title, more than an estate, which remained not with himself. Their claim was wholly dependent on the contingency, that the noble fief should devolve to them.

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Those sprung from a family after their estate had been nobilitated, possessed no pretensions either to inherit the honours, or to sit in parliament before 1587, unless the lands devolved to them, no not even if they happened to be the nearest heirs entitled in the ordinary course of legal succession to take both: And as, on succeeding after its legislative quality had been taken from the fief, they could acquire no more than was then appendant to it, their succession even to the noble estate after 1587 could not give them stronger pretensions to a dignity, which had ceased to be connected with it, than any other person, who, without being lineal heir, had succeeded under an entail. Of course, a noble descent which had commenced, no more than a noble possession which had been held, before 1587, could not after that year be at all regarded in a question concerning a right to a Peerage. A relation, borne immediately to the particular person who possessed the honour in 1587, became then the only ground on which a good claim could afterwards be laid to it. The propinquity, by which alone that rank could be vested, was obliged to point towards this nobleman; and he became the source from which a connexion, efficient of nobility, was required to be traced.

Suppose that, in the eleventh century, a parcel of lands had been erected into an Earldom by Duncan or by Macbeth; that the person, in whose favour they had been elevated to this rank, had found himself in a few years obliged to sell them, and that none of his descendants had ever re-acquired them, but that in 1587 they had still belonged to another family; I ask, Would his heir-male, on proving his descent, have then been entitled, after a revolution of ages, to be restored to the Peerage? surely not. His ancestor's right to a place in parliament, and even his pretensions to

to the title of honour, passed from him as soon as he parted with his estate, and both went along with it to the purchaser. In 1587, therefore, the heir-male, descended of the first Earl, possessed not a seat in that assembly: He was not even noble: And of consequence he was not one of the Lords of parliament who were favoured by the statute made in that year.

Suppose that, instead of selling the Earldom, the first Earl had settled it on a younger son, and that the noble estate had continued in the younger branch of his family till 1587; a case of which examples have been cited: Would the heir-male lineally descended from the eldest son, who had been disinherited in the ancient days of Malcom Canmore, have been entitled, on establishing his propinquity, to reclaim the honour in the distant reign of James VI.?

Or suppose that the first Earl had not disposed of the Earldom, but that it had continued for some generations to descend uninterruptedly in the right line of males, and that the nobleman, who possessed in the year 1400, had either sold it to a stranger from his blood, or settled it on a younger branch of his house: I imagine, nevertheless, it will universally be allowed that the person, who was both heir-male, and lineally descended of him who had disposed of the Earldom in 1400, as well as of the original Earl who had been ennobled in the twelfth century, would not have had a good right to the Peerage in 1587.

In 1771, George Sutherland of Forfe, heir-male of the old Earls of Sutherland, was found by the House of Lords not to retain a just claim to that ancient dignity, which in 1514 had devolved

volved to an heir-female, Elifabeth Sutherland, whose male descendant was rightfully possessed of the noble fief in 1587.

Objects are obscured by distance, and the perceptions, produced by such as are very remote, are commonly faint. Duration of possession, exhibiting to view a long course of examples of all the powers derived from right, and exciting an idea of something which a strong resemblance renders scarcely distinguishable from it without a nicer inspection than most spectators are able to give, begets by degrees a notion of right; and time and habit, even in the case of usurpation, add continually more and more firmness and solidity to this imagination. But suppose that those settlements, which were made by the Earl of Caithness * and by the Earl of Huntley †, had been executed in 1580, a year in which they should have produced the same effects as followed upon them in the fifteenth century, and mark the consequences.

A man, who before 1587 succeeded to a barony held of the crown, obtained a right to sit in parliament; but one, who succeeded after that year, would no longer derive from it an elective seat. In like manner, a person, who after 1587 succeeded to an Earldom, would enjoy all the proprietary rights belonging to that feudal dignity: The title, however, and the rank of Earl, which after 1587 marked not the proprietor of an estate of a certain denomination, but an exalted order, consisting of hereditary legislators, and which did not continue to reciprocate to the name retained by the fief, would not belong to the owner of it, unless he happened also to be found in the condition without which they could not

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vest

* P. 113. above.

† P. 86. above.

vest in him, or unless he was the person entitled to them by blood.

My Lord, if those Peerages, which were formed in 1587 out of dignities that had originally been territorial, be not limited to heirs-male descended from the persons who were then possessed of them, one of three alternatives, each attended with difficulties, must be adopted to govern their succession. Either they must descend in the direct line of the lawful blood of that nobleman in whose favour the lands were first nobilitated : Or some other individual must be singled out among the intermediate Lords who possessed them, and his heirs must be preferred to those of all the other possessors : Or the heirs of every person, who successively enjoyed them during the whole period from their original elevation to the year 1587, purchasers as well as others, must all be equally and indiscriminately entitled, by kindreds and even by branches, without any exception, to inherit them. The first hypothesis hath already been shewn to be adverse to the genuine nature of those honours, which rendered them inseparable from the noble fiefs erected into them ; to the established practice, which was entirely conformable to that nature ; to the ancient constitution of the Scottish parliament, in which seats were allowed only to freeholders, who held lands of the crown ; and to the express terms of the act passed in 1587, which, supposing the Lords who were then possessed of nobility to be the only members intended to be admitted for the future to sit without election, prove that a sacred regard was meant by the statute to be had to the possession held in that year. The second supposition is liable to all the same objections as the first, besides that it should then be impossible to discover any general rule, founded on rational principles, for pitching

ing on the particular person whose heirs ought to be preferred to all the other possessors. The third, by its perplexity, would confound the whole law concerning peerages, and might cause titles almost innumerable, yet exactly the same with each other, to spring out of every ancient honour.

The posterity of a person, who in any year of the long period during which honours continued to be territorial, in 1586 for instance, had divested his family of the noble fief, could never afterwards succeed in right of him; because the dignity had for ever parted from them, as irrevocably as if they had never been noble. The peerage could go only to the heirs of the purchaser, that is, of him who was both Lord of parliament and owner of the estate in 1587.

The nobleman, in whom the honour was then vested, is the first, among all the possessors of it, who can properly be denominated a Peer. None of his predecessors enjoyed that illustrious pre-eminence, an exclusive and a personal right, in consequence of their dignity merely, to sit in Parliament by inheritance and without election. That, therefore, which, in the just sense of the word, can alone be termed the Peerage, dates its origin only from him, and he is really the person who ought here to be accounted the first that was ennobled. His ancestors were no more than feudal owners of grounds distinguished by a particular denomination: And as a genuine Peerage can be conveyed only in the pure blood which has enjoyed it, the parliamentary dignity, the thing to descend here, can now go only to persons whose descent is derived in a right line from the Lord who sat in Parliament, or

who became a Peer, in 1587; the first nobleman possessed of that high privilege *.

Are those
Peerages,
which were
formed out of
personal ho-
nours, also
limited to
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descended of
the noble
Lords who
possessed
them in
1587?

In 1587 a greater change was produced both on the internal nature and on the legal descent of territorial honours, than on those of personal dignities; and, if the Peerages, erected out of the former, became then descendible only to heirs-male sprung from the person first ennobled, those, created out of the latter, must assuredly be limited in the same manner. It is natural also, at first thought, to suppose, that such as had always been disincumbered of the overbearing weight of land, would be surer and more independent possessions, as well as more strictly entailed to the blood of him who had originally been raised to them, than those which had been bestowed only on property; and perhaps, on this account, it may appear more violent to confine their descent, within the narrow boundaries which have been described, to heirs of the noblemen who possessed them in the late days of James VI. But, before 1587, personal had not, more than territorial titles, imported parliamentary states, which, amidst a strong, but deceitful resemblance, are essentially different from both of them. In that year an order was set to nobility; and, as all noble honours, having been converted into proper peerages, were then rendered homogeneous, it is not likely that the same species of hereditaments either could be intended, or would be suffered to be governed after it by different rules of succession †.

S E C T.

* See note [M.] at the end of the volume.

† See note [M.] at the end of the volume.

S E C T. V.

Causes of the Irregularities to which Peerages were sometimes incident in their Descent after 1587.

THE principles, which have been explained, will probably be found to be those by which honours were generally governed in their descent; for I dare not affirm that they were steadily followed in all cases without any exception. In consequence of the feebleness and the disjointedness of government, of the remarkable brevity or great imperfection of the laws, and above all, of the resistless force of landed property which bore every thing before it in Scotland, right was sometimes grossly outraged there: Peerages were late of arriving at their full importance; it was also long before people attained just ideas concerning them: And a man must be little acquainted both with the general history of that country, and with the memoirs of particular families, who can assert, that, after 1587, more than before it, any inflexible rule was invariably applied in practice to the regulating of their succession*.

In the sixteenth, and even in the seventeenth century, the Scottish Parliament met not either to impose exorbitant taxes under the specious denomination of supplies necessary for public service,

* Hawthornden, p. 127. 144. 220.

service, or to vote immense sums to be distributed in judicious portions among its own members. Objects, less profitable to individuals, engrossed their attention ; and during many ages little advantage could be gained by rapacious venality from attending that assembly. The subjects of its deliberations, and the duration of its meetings, were indeed gradually enlarged after the reformation : The nobility, too, was highly exalted in rank, and the commonalty was proportionably debased, in the time of James VI. But, from the singular constitution of that sovereign court, neither were seats in it greatly raised in value, nor was an addition, corresponding to that made to the dignity of the Peers, derived to their weight, by the alteration effected on their condition in 1587.

The committee of articles.

In an assembly to which every freeholder might repair, business could not be expedited with understanding, or even with decency. Amidst the tumult and the uproar to which numerous and mixed conventions are continually incident, speeches can be distinctly heard by few of the multitude to whom they are there addressed, and many of the members who compose them must be very unfit to decide on the profound subjects on which they are called to deliberate. Affairs were necessarily obliged, for discussion or for preparation, to be referred to committees ; and, with this view, those termed LORDS OF THE ARTICLES were appointed for digesting all matters of a public nature. This committee, a very ancient one in the Scottish Parliament, was generally composed of persons taken from each estate ; and no doubt the royal inclination would often possess a great authority in directing the voices of their electors ; but the election itself, the formal act, seems not to have ever been made by the crown. Even Charles I. and Charles II. princes who were not hasty to part with any

any prerogative which had been exercised by their predecessors, never pretended to the power of appointing them. Queen Mary, on being twitted by Lord Ruthven with having, by a secret influence antecedently exerted in her court at Seaton, over-ruled in 1566 a regular nomination which probably had afterwards been made of them at Edinburgh, disclaimed having had even this extrajudicial share in recommending to choice some of her devoted tools on whom the votes had fallen. It is highly probable, that the articles were originally chosen by the body whose authority was delegated to them*. From a letter, perhaps carelessly expressed, which was addressed by that princess to Bethune her ambassador at Paris, it is clear that the election mentioned there was made in Parliament by those members, who, after an adjournment on the 4th of February, having been again convoked according to custom, had held on the 7th of March†, the spiritual as well as the temporal estate, a meeting sufficiently regular on purpose to make it‡. Their number, which, after frequent variations,

* Convocatis tribus regni statibus ibidem congregatis, electae fuerunt certae personae ad articulos, datos per dominum Regem, determinandos, data caeteris licentia recedendi. *Title prefixed to the acts of the Parliament held at Perth on the 26th of May 1424.*—"To the articles put by the King to the Prelates, **mighty Lords** of Parliament, Earls, and Barons, to be decerned by certain persons thereto chosen by the three estates." *Title prefixed to the acts of the third Parl. of James I.*—"With power committed by the whole three estates to certain persons under written, to commune and conclude upon the matters after following; which persons being called and appeared: And these are the names," &c. *Title prefixed to the acts of the fourth Parliament of James III.*—"The statutes, ordinances, and conclusions, advised and concluded by the Lords chosen to the articles thereupon." *Title prefixed to the acts of Parl. 1491.*—See also the titles prefixed to the acts of Parl. first and Parl. fifth of James I.—and of c. 34. of Parl. 1451.—Erskine, I. 3. 5.—Parl. 1567, c. 25.—Parl. 1581, c. 9.

† Perhaps the Queen, or the transcriber, mistook dates.

‡ Keith, Appendix p. 126.—History, p. 326. 331. &c.

tions, was at last ordered * to be equal, and never fewer than six or more than ten, of each estate, was commonly eight †: And, in very early times, their election was made after a form artfully contrived, by which the court, without directly nominating them, was almost insured that none, who would not be obsequious to its will, should be put on the committee. The ecclesiastics elected eight noblemen; the nobility chose eight clergymen ‡; and these sixteen made choice of eight burgeses, and also, after representation had been introduced into counties, of eight commissioners of shires ||. From the account given by Hamilton, by Spotswood, and by Randolph, of the transactions of the Parliament which was held in 1560, it appears, that even in the time of Queen Mary they were chosen after that manner, or one extremely like it. Hamilton, the archbishop famous for his lewdness, for his catechism, and for his cruelty, was present, as well as Randolph, in that assembly §; and Spotswood's father, the superintendant of Lothian, sustained an eminent part in those busy scenes. Neither Hamilton indeed, nor Spotswood ** says, that the noblemen were chosen by the clergy: But, as the whole landed interest was zealously attached to the religious innovations which were then going to be established, and the choice could not fall on Lords disaffected to the new system, the same causes, which rendered the nomination of the ecclesiastics a matter worthy of particular notice in a history of the overthrow of Popery, extended not with him
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* Parl. 1587, c. 37.

† Parl. 1474, ch. 75.—Parl. 1477, ch. 87.

‡ Keith, 487.

|| Parl. 1663, c. 1.

§ Keith, p. 146. 63.—Crawford, Officers of State, p. 375. 381.—Pitcottie, p. 362.

** P. 149.

to that of the nobility : And Spotswood's omission is supplied by the express assertion of Randolph *, an envoy and a foreigner, to whom every thing then beheld by him carried an appearance of novelty, and who was bound by duty, as well as prompted by curiosity, to attend accurately to the proceedings. In fact, among all the noblemen present in that numerous Parliament, only three dissented from the act which approved of the doctrine of the reformers; the Earl of Athole, Lord Borthwick, and Lord Somervell; who, in terms which might have proceeded equally from bigots and from infidels, declared laconically, " That they would believe as their fathers had done before them †." The burgesses, if credit is due to Randolph, were then chosen by the estate to which they belonged; and it was only afterwards that the right of nominating them came to be transferred to those sixteen who had previously been elected from the ecclesiastics and from the nobility. As the inferior members of the landed interest rarely attended in considerable numbers, the small Barons, in presence of their superiors, could not aspire to the honour of being put on the Articles; but, after they had become obliged to serve by representatives, and a dispensation from attendance had been granted to the other freeholders, some of their commissioners, in a number equal to those elected from the estate of boroughs, were ordained ‡ to be named on that committee, which, as at least after the reformation the prelates were commonly either the creatures or the rulers of the court, was caused, in consequence of the singular mode of electing them, always to consist of persons attached to administration: But the influence of ministry was almost abso-

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* Maitland, p. 929.—Robertson, Appen. 4.

† Spotswood, p. 150.—Knox, p. 253.

‡ Parl. 1587, c. 114.

lutely secured in it by another peculiarity remarkable in its extraordinary frame.

Officers of
State.

Among the ordinary officers of the King *, to whom certain departments in the government were entrusted, and who discharged their respective duties each immediately under the Sovereign, some were entitled, by virtue of their offices, to sit in parliament, in convention, and in all meetings which concerned the state; and were distinguished on that account, from the other officers of the crown, by the appellation of the Officers of State. The particular offices, admitted to sit on this title, seem not to have always been exactly the same †, but were at last declared in 1617 to be eight; the Lord High Chancellor, the Lord High Treasurer, the Lord Privy Seal, the Lord Secretary of State, the Lord Clerk Register, the Lord Advocate ‡, the Lord Justice Clerk, and the Lord Treasurer Depute ||: And that important privilege was so much understood to belong both to prerogative and to them, that, during times in which either different persons were nominated separately to hold any of them, each fully in himself, or any of them was vested in joint commissioners, the crown might appoint one person to sit for that office in parliament; a power which was still retained even after the committee of articles had been abolished in 1690 §.

The

* Parl. 1585, ch. 20. 13. 17.—Parl. 1587, ch. 31.—Parl. 1592, ch. 135.—Parl. 1633, ch. 9.—Parl. 1641, ch. 16. 20. 21. 29. 68.—Parl. 1693, ch. 6.

† Parl. 1567, ch. 25.—Parl. 1581, ch. 9.

‡ Parl. 1532, ch. 6. § 33.

|| Sir G. Mackenzie, of Precedency, ch. 8.—Wight, tit. 2. f. 3.

§ See a list of the members of the Parl. 1703, the last of Scotland, in Ridpath's account of their proceedings.

The Earl of Drumlanrig, the first Scotchman who at the Revolution joined the Prince of Orange *, and who, afterwards, under the title of Duke of Queensberry, bore so considerable a part in effectuating the union of the kingdoms, sat, under authority of a letter by which King William named him to occupy the place of Lord High Treasurer, in a parliament held in 1693 †.

It was in this character, also, that his long political life was begun by Lord Archibald Campbell, who was afterwards created Earl of Ilay, and who, after enjoying during a great part of his days the sovereign direction of Scottish affairs, had the rare felicity, in 1761, of dying on the verge of eighty without a moment's pain, in full possession both of his faculties and of his power. In the parliament to which his brother, the young Duke of Argyle, who became so conspicuous during the administration of Sir Robert Walpole, was High Commissioner, Lord Archibald sat on a letter, by which Queen Anne appointed him to the place and the vote of Lord High Treasurer ‡; an office, which, after the Duke of Queensberry, in consequence of the superior credit acquired by the Earl of Perth, had been removed from it in 1686, was always in commission ||.

Mr Johnstone, son of a Lord of Session, Sir Archibald Johnstone of Warriston §, who, after the Restoration, was selected to suf-

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fer

* Carnwath's Memoirs, p. 9.

† Index to the acts of that year.

‡ Index to the acts of Parl. 1705.

|| Burnet's History, v. 4.—Crawford's Officers of State, p. 423.—Index to the acts of Parl. 1693—1695—1696—1698—1701—1702—1703.

§ Sir Archibald Johnston was also a Commissioner of Exchequer, an advocate for the

fer for the bold measures in which he had concurred before it, having been recalled from the court of Brandenburg at which he was Envoy, was created by King William one of his principal Secretaries of State, and by a warrant from his Majesty was nominated to sit Lord Secretary in the parliament which met in 1693 *.

Sir James Ogilvie, an advocate, in 1689, pushed himself into public notice by a strong speech made in favour of King James, after the Prince of Nassau had been raised to the throne of England; he distinguished himself also in the same cause by being one of five, who, in the convention of estates, dissented from their memorable vote which declared that Monarch, by mal-administration, to have forfeited the crown †; but having afterwards been called into office by King William, Sir James occupied, in consequence of a letter from his Sovereign, the place of Lord Secretary in the parliament which assembled in 1696; and, as he had already been chosen a burgess to represent Cullen, on his promotion a writ was issued to that borough to elect another commissioner in his room ‡.

Small consequence even of proper peerages.

The extensive knowledge, the superior address, the great weight, derived to the officers of state from an enlarged experience, from much

the King, and Lord Register of Scotland.—Parl. 1647, ch. 35.—Parl. 10th--12th March 1649.

* Parl. 1661, ch. 2.—Parl. 1661, ch. . (not printed.)—Parl. 1662, ch. 10.—Parl. 1663, ch. 2. (not printed.)—Burnet, B. 5.—Index to the acts of Parl. 1693.

† Parl. 1689, ch. 13.—Hume, v. 8.—Carnwath's Memoirs, p. 22.—Crawford, p. 247.

‡ Index to the acts of Parl. 1696.

much practice, and from their high places, rendered the sway of the crown almost absolute over that mighty committee, of which, officially, they were constituent members. In the public records, the Lords of the Articles are sometimes termed "those to whom the whole power of parliament is committed *;" and as their authority in that assembly could not but be irresistible, the court was ensured of over-ruling most of its interesting resolutions. All matters, purposed to be laid before it, were previously examined by the Articles. Bills, which they thought ought to pass into laws, were prepared by them: And overtures, which had been rejected by their voice, could not regularly be introduced into the house. Antiquity and custom, especially if the ideas of them are frequently invigorated by the aid of ceremonies, are, with the bulk of mankind, powerful recommendations of public institutions. No doubt, the states of Scotland, like every legislative body, whose sovereign determinations are controllable only by its own wisdom, retained a discretionary power, which in extraordinary cases might be exercised by them †, of dispensing with that regulation. There are grand occasions, too, on which to daring spirits all forms appear to be puerile elements: Senescent government itself sometimes dissolves from inveterate corruption into its first principles: And men violently agitated by passion, looking only to ultimate ends, cannot always be restrained from trampling both under foot with

* Parl. 1471, ch. 52. 58. 61.—Parl. 1474, ch. 75.—Parl. 1483, ch. 108. f. 2.—Parl. 1489, ch. 27.—Parl. 1493, ch. 69. 71.—Parl. 1535, ch. 35.—Parl. 1540, ch. 98.—Parl. 1567, ch. 25.—Parl. 1581, ch. 9.—Extracts from the Records of Parliament, printed among the papers exhibited to the Court of Session in 1707, in a cause between the Earl of Crawford, the Earl of Sutherland, the Earl of Marischal, and the Earl of Errol, about their precedence.

† Parl. 1640, ch. 3.—Fountainhall's Decisions, v. 1. p. 150. 151.

with an indignant contempt. But ancient and established modes, in consequence of the strong prepossession excited by constant observance of them in favour of their indispensable necessity, acquire a firm authority over the mind, which, in similar situations tending continually towards its accustomed usages, resists with great force every sudden departure from them; and the instances, in which parliament either neglected to consult the Articles, or differed from their decision, are extremely rare. The other members, either abashed into silence by modesty, or seduced from duty by expectations, or awed into co-operation by apprehensions, were seldom inclined to oppose overtures which had been brought into the house with all the advantages derived from the decided opinion of that respected committee. Hence the procedure made on their reports was often indecently precipitate; and people, taken by surprise, were either hurried by ministerial audacity, or necessitated from their own ignorance, to agree to them. Despair of success begot in many both an unconcern about measures which they constantly found it vain to resist, and an aversion to an attendance which they knew would be fruitless; and matters were at last brought to this sorry pass, that, till in very late times, each parliament assembled in a full body only two days. On that, to which they were summoned, the members, riding in great pomp, conducted the King, or the Commissioner, to the house, and, after having chosen the Lords of the Articles, were immediately adjourned: On another day, at a distance from the former, they were again convened either to approve or to disapprove of the bills prepared for their consideration: And on this day the meeting was prorogued or dissolved*. The Committee of Articles was attempted

* Burnet's History, year 1661.—Erskine, B. 1. t. 3. f. 5.—Keith, p. 34.

ted to be regulated *, but was not entirely abolished, even by those zealous conventions which met in the reign of Charles I. and their acts were afterwards rescinded. Hence it was very late before parliament attained in Scotland that consequence, which in every country naturally belongs to the supreme legislature. The weight and even the independence of the nobility, notwithstanding the elevation added in 1587 to their rank, were rather diminished than increased by the innovation then made on the constitution: Intellectual seats did not soon become important objects: And their little estimation, often begetting an indifference about them, could not but affect in some cases the regularity of their course in succession. People, not possessed of adequate fortunes, could not be anxious about preserving noble honours, which, disconnected from landed property, and unsustained by it, would often be inconvenient, rather than desirable possessions; and those in wealthy circumstances would not find much difficulty either in assuming, or, for want of competitors, in retaining them. Mens ideas, even about their interest, are not always distinct. Instances might be produced, in which peerages, the ultimate object of modern ambition and of all servility, were refused to be accepted, even after parliament had arrived at its just authority, and, in consequence, after they had acquired their proper nature: And a little recollection will shew, how, in late, as well as in early periods, their descent might sometimes be disturbed by other causes, as well as by their small value.

Even in settled times, in which juridical matters are coolly discussed, like questions merely speculative, by acute disputants, and
judicial.

Violent disorders in Scotland.

* Parl. 1640, ch. 3.

judicial depravity, amidst a prevailing corruption, is overawed by public inspection, mean corrupt artful men, imposing by a specious language on simple auditors, are often able to employ to unrighteous purposes those holy places, which ought ever to be preserved inviolably sacred to rectitude and to truth, and a strict impartiality cannot always be reached in the retired abodes and shady temples of private justice. The distracted state in which Scotland continued, with little interruption, during the hundred and twenty years that immediately followed the introduction of Peerages in 1587, rendered it almost impossible for their descent even then to be steadily governed by fixed and consistent rules. The successful attack which had been made in the sixteenth century on the established superstition, the barbarous murder of King Henry, the forcible deposition of Queen Mary, the base assassination of Murray the regent, the long minority of James VI. that Prince's overweening attachment to very worthless favourites, the unpopular innovations made in religious affairs after his accession to the English crown; these events, which succeeded each other with an uncommon rapidity, conspired to produce much tumult in the nation, and the whole country was divided by them into violent factions, whose animosities were continually inflamed by all the causes that operate with most force on human passions. Hence James's reign was exceedingly turbulent; but as, in his time, matters arrived not at extremities, it may be said to have been peaceable in comparison of the next, during which, from the arrogant pretensions of Charles I. and from the unadvised obstinacy with which that unfortunate Prince persisted in his arbitrary designs *, the whole island was thrown into one great ferment, and a civil war

* Parl. 1647, ch. 10.

war. was at last kindled, which terminated in a solemn trial and formal condemnation of the King. Soon after that awful catastrophe, the Commons resolved *, in England, That, in the exercise of the legislative power, they should not take the advice of the Lords, and the House of Peers was declared an useless and even a dangerous branch of the legislature: Both kingdoms were subjected to one Parliament: And, during this period, the Peerage was little minded in either. The parties which principle, interest, affection, passion, gratitude, resentment, had generated during the preceding reign, subsisted in full vigour after the Restoration; and the treasonable conspiracies or political schemes †, openly pursued or secretly adopted by Charles II. were ill calculated to moderate either their rancour or their zeal. This thoughtless libertine, possessed, amidst strong prejudices, of a considerable portion of good sense, was a little restrained by the dread inspired by his father's sufferings and by his own exile ‡: But the furious career held by his infatuated successor, in four years precipitated James VII. from the throne. A government, as well as a party, founded on principles seemingly liberal, is always obliged for some time to adhere, at least in appearance, to that system to whose popularity it is chiefly indebted for its credit; and most of the admired improvements, which have ever been made on the constitution or the laws of Great Britain, owe their establishment to that attention to character, which, operating by shame and by fear, without virtuous affection or sincere patriotism, is still productive of some consistency even in public conduct. At the Revolution

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* Journals, 30th Jan. 6th Feb. 1648-9.

† Hume's History of Charles II. particularly ch. 66.

‡ Burnet.

the Committee of Articles, among the institutions which had then been adjudged by the states of the nation to be grievances *, was finally abolished in the year 1690 † ; and as, in consequence of the abolition of episcopacy, the temporal Lords were formed into an estate distinct from both the barons and the burgesſes ‡, its full importance was thereby acquired both to the Peerage and to Parliament. But long poſſeſſion, good offices, remembered kindneſſes, and perſonal reſentment, ſtill preſerved many friends warmly attached to the abdicated family ; and the period, which intervened between the acceſſion of King William and the union of the kingdoms, was much too ſhort to extirpate thoſe keen factions which are not wholly obliterated in our days.

In a country, inceſſantly rent by diſſenſion, often involved in civil war, the voice of right would ſometimes be faintly heard, and, amidſt the noiſe of arms, titles could not always be critically examined, but each party, without a ſcrupulous nicety, might ſupport with vigour the pretenſions of its adherents. In turbulent times, even a titular Lord is not a contemptible acquiſition : A feeble junto would not haſtily reject any additional luſtre derivable to it from a dignified aſſociate : A ſucceſſful one, either from decency, might not incline to diſallow pretenſions of which they had availed themſelves during their adverſe fortune, or might find it political, even after affairs had been reduced to order, to admit of doubtful claims made by zealous partifans to noble honours. Sir George Hume, a Lord High Treafurer of Scotland, whom Spotf-
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* Parl. 1689, ch. 18. ch. 3.

† Parl. 1690, ch. 3.

‡ Parl. 1689, ch. 3.

wood characterises “a man of few words, but of deep wit,” besides the garter and other honours which were heaped upon him by James VI. was created by that King Earl of Dunbar *; and two daughters he had were nobly married; but on his death in 1611, without heirs-male of his body, the dignity became extinct. However, at the distance of fourscore years, Sir Alexander Hume, a collateral male, who had settled in Holland, was deputed by the States to congratulate the Stadtholder on his advancement to the throne of England, and presuming, probably, on the credit thence derived to him, assumed the title; and Douglas asserts also, that, in 1689, he was acknowledged by King William for Earl of Dunbar; an acknowledgement very insignificant, as Princes, at addressing those who are presented to them, or at describing them in deeds, inquire not into their pretensions to the appellations borne by them: A Sovereign, recently called in a storm to the crown, would avoid those offensive disquisitions: And Sir Alexander’s possession was only momentary. On his death, which happened soon after, none of the heirs-male of Sir George ever pretended to the peerage. Such irregularities might excite little jealousy, or awaken hardly any attention; and even a formal sanction might sometimes be easily obtained for them, if either a single person, unopposed by any competitor, and guarded in his argument, aspired to the honour, or his adversary was disabled by circumstances to prosecute his right with vigour.

* Hume, ch. 45.—Crawford’s Officers of State.—Spotswood, p. 516.

S E C T. VI.

Some Cases adjudged after 1587.

T H E commanding authority of the Officers of State, the over-ruling negative of the Committee of Articles, the small advantage derivable from attending parliament, the keen factions by which personal enmities and partial attachments were widely diffused and highly inflamed all over the country, the confused conceptions long entertained about noble dignities and their real nature : Amidst this variety of causes, which tended to disturb ancient peerages in their descent, the anomalous cases, in which the general rules prescribed for governing it were transgressed, still are surprisingly few, in comparison of those which seem entirely conformable to accurate principles ; and, perhaps, in these rare instances, a piercing eye will sometimes discover traces either of alterations regularly made in the course of succession, in ways competent to effect them, or of considerations, such as ought never to enter any decision concerning right or property. Hence, in determining on claims to them, a decisive weight ought not always to be laid on any possession which was held before the union. Even the judgements pronounced in the only three cases which came to be tried in Scotland before it ; Oliphant, Caithness, Kincardine ; are not, perhaps, entitled to be esteemed in all points inexceptionable. The King, in whose favour the first was really given,

given, as the dignity was declared to be at the disposal of the crown, was present in the Court of Session at judging the cause; and it was there found, that a settlement, by which Lord Oliphant had disposed of his honours, did not vest the peerage in the person to whom they were conveyed; probably the only one of all the points reported to have been then adjudged, that will meet, my Lord, with your unreserved approbation*. Every tittle of the decree made by the Privy Council in the second, seems agreeable to just principles†. In the third, parliament did not remount to the question, Whether peerages were then limited to males sprung from the person first ennobled? a disquisition which Lady Mary Bruce, as well as Sir Alexander Bruce, was interested to avoid, as both their claims should have been equally affected by it. The debate maintained between them proceeded on topics totally different. The nobility of the last Earl, whose death had given rise to the contest, was admitted by them both: Lady Mary founded on deeds executed by him, which devised the honour in her favour: That settlement was alleged by Sir Alexander to be liable to exceptions which annulled it: And her pretensions were also partly laid on objections personal to him. The decision, too, seems not to have been a definitive sentence on the matter of right, but a temporary resolution upon the possession only‡. The affair was referred to the Lords of Session; and the only point on which this court ever came to give an opinion, appears to have been,

Whether

* 11th July 1633. Oliphant v. Oliphant.

† Above, p. 201.

‡ 10th October 1706. "Her Majesty's High Commissioner, and the Estates of Parliament, having advised the debate, they admit Sir Alexander Bruce to his seat and vote in Parliament, as Earl of Kincardine, reserving Lady Mary's right as accords. (Signed) SEAFIELD, Cancellar. J. P. D. P."

Whether procuratories of resignation, or powers granted by the possessors of peerages to resign their honours, might still be executed, even after the death of the noblemen who had granted them *, except that Sir Alexander Bruce was likewise allowed to bring evidence of an incapacity under which he averred that the Earl had lain at making the devises in favour of his sister. As soon as judgement had been pronounced on that point, the cause was carried from the Court of Session, in the manner then employed to enter appeals to the House of Lords. A report could not be made to a parliament which existed not after March in 1707; and, perhaps, the parties neglected to prosecute their suit to a decree conclusive on the business. But the determination given in Scotland will universally be allowed to be just, if no more was intended by it than to declare, that, in succession to peerages, heirs-male are, in doubtful cases, preferable to heirs-female †.

A distinguished purity, as well as a great accuracy, bestows a high claim to an authoritative respect on all the judgements pronounced in private causes by that august assembly, to whose examination questions concerning Peerages have always been referred by the Crown since the Union. But few cases concerning them have come since the conclusion of that treaty to be scrutinised by those honourable judges: And the ancient constitution of the Scottish Parliament, the original nature of noble dignities, the various changes undergone by both, and the different rules of succession

* Parl. 1693. ch. 35.

† Index to the Acts of Parl. 1707.—Fountainhall's Decisions, 28th March 1707, Lady Mary Bruce v. the Earl of Kincardine.—Papers exhibited to the House of Lords in behalf of John Maclellan, Esq; who claimed the dignity of Lord Kirkcudbright.

cession consonant to them, (the principal materials without which solid and steady opinions cannot here be formed) have not hitherto been laid before that supreme court. Hence its decisions, seeming not to be entirely consistent among themselves, can hardly be admitted for infallible precedents which ought to be invariably followed in subsequent cases; and observations submitted upon them with freedom cannot, my Lord, be unacceptable to elevated minds, ever anxious to be fully informed and to decide with rectitude.

The decree pronounced in 1762, by which the dignities of Earl of Caillis and Lord Kennedy were adjudged to the heir-male of the bodies of David the first Earl of Caillis and of Gilbert the first Lord Kennedy *, seems to assume, for a general rule, that ancient Peerages are limited to heirs-male descended of the person first ennobled. Understand it in this sense, and it degrades from his nobility every person, male or female, by whom honours were possessed after the death, and who was not heir-male of the body, of that nobleman: A consequence deeply interesting to some noble families, which probably was not foreseen.

Case of Caillis.

The dignity of Caillis had originally been personal: That circumstance, however, after the distinction between territorial and personal honours had been obliterated in 1587, not being entitled to regard, it is probable, had not any influence on the decision. In another remarkable case, relating to an ancient Peerage which had originally been territorial, and which had existed more than two centuries before the accession of Queen Mary, that distinction

Case of Sutherland.

was

* P. 203. above.

was attempted to be revived ; indeed, the weight of the argument pleaded in behalf of one of the claimants, Lady Elifabeth Sutherland, seems to have been laid upon it, and this lady prevailed in the suit : Nevertheless, it was resolved by the House of Lords, that none of the charters then produced affected the dignity claimed by the competitors, and that their operation was entirely confined to the landed estates conveyed in them : A declaration subversive of the distinction *.

Had that high court, drawing a right line, distinguished deeds prior to the year 1587 from those posterior to it, your Lordship perhaps will now be of opinion, that their resolution would have been both well founded in principle and agreeable to practice. But, in the argument on which their judgement proceeded, it seems to have been supposed on all hands, that in Scotland noble dignities had always possessed a nature exactly the same with Scottish peerages at present ; a proposition to which, after the changes successively undergone by honours have been explained, it will perhaps be thought that assent ought not to be given.

It

March 21.

1771.

* “ Adjudged, That the titles, honours, and dignity of the Earldom of Sutherland
“ descended to Elifabeth the wife of Adam Gordon, upon the death of her brother
“ John Earl of Sutherland without issue in 1514, as heir of the body of William who
“ was Earl of Sutherland in 1275, was assumed by her husband in her right, and from
“ her descended to the heirs-male, (who were also heirs of her body) down to the death
“ of the last Earl of Sutherland in 1766, without any objection on the part of the male
“ line of the said William :

“ That none of the charters produced affect the title, honour, and dignity of Earl of
“ Sutherland, but operate as conveyances of the estate only :

“ That the claimant Elifabeth Sutherland has a right to the title, honour, and dignity of the Earldom of Sutherland, as heir of the body of William, who was Earl of
“ Sutherland in 1275.”—*Brief.*

It was adjudged in the case of Sutherland, that, on the death of John Earl of Sutherland, without issue, in 1514, the title and the dignity had descended to his sister Elifabeth, as heir of the body of William, who was Earl of Sutherland in 1275; that from her they had descended to the heirs-male, who were also heirs general, of her body, down to the last Earl who had died in 1766; and that his only child, Lady Elifabeth Sutherland, by whom the honours were claimed on his death, had a right to them in the same character. To a man, my Lord, who analyzes this judgement with accuracy into parts, the pretensions of that Elifabeth, who succeeded in 1514, will probably appear perfectly indisputable; but will now be granted to have been founded solely on her property of the estate, and not to have been a bit stronger than that of the younger son of the Earl of Caithness, who, in consequence only of a settlement conveying the fief to him, was universally admitted to have acquired right to the honours, yet was no more than a purchaser. It must also be owned, that the right of the heirs-male of her body, in particular that of her great-grandson Alexander, by whom both the fief and the title were enjoyed in the year 1587, is unquestionable. I choose not to examine the justness of the conclusion, which appears in 1771 to have been drawn in favour of the amiable Lady by whom both are at present possessed. Her right was established by that decree: And I shall not inquire, Whether a possession of an insignificant title borne by lands, held before 1587, in 1514 more than in 1114, ought now to be regarded in any competition about a parliamentary peerage; but may observe, that the judgement seems not easily reconcilable to the principle approved in the case of Cassillis; and that, on like grounds, almost every ancient honour might be

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found

found still to be a feminine, a devisable, a transferable, and even a saleable dignity.

Cafe of Kirk-
cudbright.

In a case later than the former, a modern peerage, conferred by letters patent, was found descendible to an heir-male who was not sprung of the original patentee. His nobility was ascertained by the decision there pronounced upon it; and as my present argument was intended to be confined to ancient dignities, it would be improper to go into a critical examination of the grounds on which that judgement proceeded. It is sufficient for my purpose to remark, that the rule there adopted seems to be widely different from that which was followed either in Caffillis or in Sutherland.

Peerages created by patent are generally held by lawyers to be more limited in their descent than those acquired after any other form: And a short ambiguous possession; originally seized in any of those parliaments * which were assembled in the troubled reign of Charles I. but whose acts were afterwards annulled for their unlawfulness †; and continued, perhaps, during a few busy years, before matters could be accurately investigated, after the restoration, by a zealous partizan of either party; but speedily relinquished by those, who, if their right had been good, might still have retained it; and never attempted to be recovered before the Union; can hardly afford sufficient ground for decreeing any dignity to a collateral heir, male or female, of the person first ennobled by it, in opposition to express words, to which a strict and determinate sense, very different from that annexed to them in cases of private

* Parl. 1647, c. 14.—Parl. 1649, ch. 29.—Parl. 7th Aug. 1649, ch. 27.

† Parl. 1661, ch. 6. 15. &c.

private property *, is affixed by law. A title is easily assumed : Its origin and its limitations soon descend into oblivion, unless the right of the person who takes it be recently contested by another : The people entitled to question pretensions to honours must commonly be few ; and those interested to do it may not always be apprized of their claim, or able to assert it. Hence usurpations, in the case of peerages, are perhaps more frequent in Scotland than is sometimes imagined ; and the precedents which have been cited prove, that no general principle hath hitherto been either established, or adopted, by the only competent authority, for governing their succession.

It cannot, however, be pretended, that each peerage must be regulated in its descent by laws peculiar to itself. Amidst the vicissitudes to which, either from their intrinsic constitution, or from external causes, noble honours might be subject in North Britain, these dignities always possessed a nature essentially proper to themselves ; and it will be owned to be important both to the security of the nobility, and to the reputation of the law, that, in future, their succession be steadily governed by uniform and invariable general rules. Considerable difficulty may indeed be found in fixing on those which can justly be applied to them in all cases : But it will probably be granted, that that rule, which is in itself conformable to their present nature, ought now to be constantly followed in determining their descent.

Before the Union, Scottish dignities were resignable into the hands of the crown ; and the series of persons, for whom they

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had

* Above, p. 205. 206.

had originally been destined, could then be altered by the joint act of their possessors and of the King. But after that event, those entitled to inherit them could not be disappointed of their chance of succession, and in this respect their right became indefeasible. Other privileges also were acquired by them: The ancient peerages of Scotland were all converted into peerages of Great Britain *: The laws concerning them have thence sustained considerable alterations; and the rules, by which their devolution is determined, ought not, more than other matters, to contradict the form then given to them.

My Lord, your Lordship's liberal mind, maintaining a steady respect to those principles which here ought alone to enter into consideration, may perhaps perceive it to be congruous to the condition which was acquired by them in 1587, that Scottish peerages be now limited to heirs-male descended of those Lords by whom they were possessed in that year. This rule seems to be the only one to which all the phenomena, observable about territorial honours, can be reconciled in a manner agreeable to truth, and consistent with reason; but, contradicting reigning prejudices, which from long inattention have gained much authority, may also appear too bold to be adopted: And perhaps your Lordship will think it both more proper and less violent, that they be distinguished from their origin into two classes, such as originally were personal dignities, and those which arose out of territorial honours; that the former be permitted, like the Earldom of Caithness, to descend in all cases, without any limitation, to the heirs-male of the bodies of the noblemen who were first advanced to them;
and

* Parl. 1707. ch. 7. § 23. &c.

and that the latter alone be restrained from ascending higher than the year 1587.

Few old peerages can now be pronounced, with perfect assurance, to have originated from titles merely personal: And if those, which can be authentically proved either to have existed before the lands belonging to their possessors were raised to the dignities reciprocating to them, or to have truly been granted personally in parliament, should be permitted to go to heirs-male sprung of their ancient Lords before 1587, no great violence would be done to the constitution, nor would an unbearable insult be put on the nobility. All others, whose origin is unknown, which are found not to be older than the analogous honours bestowed on the fiefs of their owners, and which seem to have been perpetually co-existent with them, may be presumed to be territorial, and, on this account, ought perhaps to be limited to heirs-male lineally descended of that nobleman, who was first created a peer by act of parliament in 1587.

Allow me, in a short digression of eighteen lines, to add, that, in the case of peerages conferred by patent, the terms in which the persons, to whom they are descendible, are there described, must alone regulate their descent; that, in explaining these, a fixed construction ought invariably to be put on the same technical expressions; and that no regard ought ever to be paid to the different courses in which, in particular cases, those honours have actually devolved; otherwise, every thing relating to their succession will be involved in inextricable confusion. The word HEIRS cannot in one case be extended to collaterals and to females, and in another case exactly alike, be limited to descendants and to males:

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In one family, the phrase HEIRS-MALE must not be restricted to heirs male of the patentee's body, and in another family be interpreted of heirs-male without any limitation: And peerages created after 1587, by grants in writing, seem to be descendible only to heirs-male of the bodies of the original grantees, unless express words, perfectly clear, and absolutely unambiguous, direct them to go to heirs-female, or to collateral males.

A system, perfectly consistent in all its decisions about them, could it be discovered, would not, my Lord, diminish the dignity of the august house formed by that exalted order; and it is full time that an end be put to irregularities which tend to contaminate its purity. But it is a first and sacred commandment of law, never to be violated, that every thing, to which a man has a right, be constantly allowed to him. A judge, whose opinions on the bench are influenced by a partial respect to the counsel who plead, to the agents who conduct, or to the parties engaged in a suit, is universally perceived to be a detestable knave. Private attachments, personal animosities, political interests, ought not to be carried to that holy place, which ought never to be entered without a pure heart. Even considerations of expediency, or reasons of state, must not be intermingled in questions of property; and no person really possessed of a good claim to a Scottish peerage ought, on any pretence, to be deprived of his nobility. It cannot, however, lessen the attention due to any rule, that the consequences deducible from it are in themselves beneficial to the public; and if the theory, submitted to your Lordship in the foregoing pages, be unexceptionable in other respects, it should afford no solid objection to adopting it, that it tends not to increase, but to diminish the number of that amphibious race, which, at the same time that its
members

members are placed in a situation in itself exceedingly awkward, because excluded from the capital privilege belonging to their state, seems already sufficiently numerous in proportion to the riches and the populousness of their country, but which, on the extensive bottom assigned at present to noble dignities, may be multiplied almost without end, only to become from poverty and from dependence disgraces to their rank, and burdens on the crown.

B O O K

B O O K V.

Additional Observations, which confirm the foregoing Theory.

MY LORD,

ALMOST every matter relating to things, whose origin, qualities, powers, effects, uses, and ends, are distinctly known, must be reducible scientifically under determinate laws, derivable from the nature of the objects, with which their appearances may be expected all to be reconcilable. Hence, in England, Peerages were brought to a system much earlier than in Scotland; and their descent has long been subject there to exact regulation. But those titles which were borne in ancient times by the Scottish nobles, differing essentially from themselves at different periods, are honours seemingly anomalous; and many phenomena, irreconcilable to the nature commonly attributed to them at present, have been observed about them. The theory, which I have now laid before your Lordship, accounts in a natural manner for most of these phenomena, which indeed are hardly explicable on any other hypothesis; and will be owned to derive a strong confirmation

confirmation from the entire consistency which it is thereby discovered to maintain with itself in all its parts.

I. In ancient times it was not uncommon for men to forbear assuming titles, to which their claim was unquestionable, till they had completed their rights to their estates in a proper feudal manner; a delicacy seldom, if ever, observed after 1587*. At present, his funeral obsequies are no sooner performed to the last possessor, than the honours are taken by the next heir.

In the year 1292, Duncan Macduff Earl of Fife was a ward of Edward of England, and John de St John was appointed by this Prince to officiate for him at the coronation of Baliol. In the commission granted to St John, Duncan is termed son and heir of the Earl of Fife, not Earl †. The Earldom was then possessed by his Sovereign.

John Earl of Sutherland, who died in 1514, is described in the return of his service ‡, in the precept issued on it from Chancery, and in the instrument of the seisin which followed upon them, John Sutherland son and heir of John Earl of Sutherland. His sister Elisabeth Countess of Sutherland, on whose possession much weight was laid in March 1771, in the retour of her service, in

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* Sup. Cafe, p. 17. 18.—Ad. Cafe, ch. 6. p. 94.

† Dalrymple's Annals, i. 222.—Rymer, ii. 600.

‡ Service, a technical term of the Scottish law, signifies "a verdict of a jury, impannelled on a brief issued out of Chancery, ascertaining the person who is heir to another that is dead." The verb, *to serve*, is used in a corresponding sense. A retour is, "a writ issued by the Director on the return of the service into Chancery, authenticating the terms of the verdict found by the inquest."

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In 1583, the eldest son of Christian Stewart Countess of Buchan was found by a jury nearest heir of his father Robert Douglas Earl of Buchan, but in his service is named only James Douglas. In 1588 he was also served nearest heir to his mother, and in his retour is stiled James now Earl of Buchan†.

II. The stiles which families had long carried were frequently changed by them for others; and these variations seem to have been made entirely at pleasure, without either the permission of the crown, or almost any rule directing the alterations.

In a charter granted on the 5th of July, in the 12th of Robert II. Alexander Stewart, a prince of the blood, is stiled Earl of Buchan: But in another charter, granted by the same King on the 22d of that month, he is termed Laird of Badenoch‡.

Walter Stewart, the conspirator principally concerned in murdering James I. was at once Earl of Athole, Earl of Strathern, and Earl of Caithness; yet in a charter, extant in the Registry, he calls himself Laird of Brechin§.

John Stewart Earl of Buchan, a son of the Duke of Albany, both stiles himself, and is stiled in the rolls of Parliament as well

as

* Suth. Cafe, p. 4.—Ad. Cafe, p. 13, &c. and ch. 6. p. 147.

† Ad. Cafe, ch. 5. p. 63.

‡ Dominus.—Ad. Cafe, ch. 5. p. 32.

§ Ad. Cafe, ch. 5. p. 32. 43. &c.

as in charters of lands, indiscriminately Laird of Buchan and Earl of Buchan *.

Robert Cunninghame, son and heir of Alexander Cunninghame Lord Kilmaurs who had been created Earl of Glencairn by James III. choosed not to assume the title of Earl of Glencairn, but contented himself all his life with that of Lord Kilmaurs. The honours, however, were afterwards resumed by his son †.

That great family, whose power was so extensive on the eastern border, and which used frequently to take party with the English, was often distinguished by the title of Earl of Dunbar, as well as by that of Earl of March ‡.

The family of Halyburton is described, even in the rolls of Parliament, sometimes Lord Halyburton; sometimes Lord Dirleton; sometimes Lord Halyburton and Dirleton; sometimes Halyburton, Dirleton, and Lambden ||.

The fiefs belonging to those noblemen were the objects immediately dignified with nobility: Their estates, being generally large, consisted of many different parcels, each distinguished by a proper name: A particular stile was rarely assigned or directed to

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* Ad. Cafe, ch. 6. p. 156.

† Crawford's Officers of State, p. 216. See note [L.] at the end of the volume.

‡ Ad. Cafe, ch. 4. p. 43. 69.

|| Ad. Cafe, ch. 6. p. 87.—Instances of many other variations might be produced. You will find them scattered all through the cafes written on claims to Peerages. See Sup. Cafe, p. 17. 32.—Ad. Cafe, ch. 5. p. 28. 32. 39. 43. &c. ch. 6. p. 86. 87. 156.—Crawford's Officers of State, p. 44.—Dalrymple's Annals, p. 18. year 1072.

be borne by their owners; but the honour conferred on their lands gave them a right to the generic appellation co-relative to it: And they assumed at pleasure any title, which either seemed most congruous to their circumstances at the time of taking it, or perhaps was most agreeable to their fancy.

III. It sometimes happened that noblemen did not take titles from lands, but were carelessly denominated, even in formal deeds, by prefixing their Christian names to the proper title of their dignity, without any addition. In old days they were wont to say simply, Mallis Comes, Murdoc Comes; as in familiar discourse we speak at present of Duke James, Marquis John, Earl William*.

In other cases they were described by their name and their surname only. The Earl of Murray is named Archibald Douglas by Pittscottie. His brother, the first Scotchman that was honoured with the Garter of England, and the last of his race that bore the title of Earl of Douglas, is frequently termed, by the same historian, James Douglas†.

IV. In Scotland honours were not supposed to be susceptible of resignation, or, I believe, I ought rather to say that they never were in fact resigned by themselves into the hands of the crown, before the time of James VI. But, after they had been rendered personal in his reign, a contrary practice became very common, and instances might be cited in which dignities were surrendered immediately

* Dalrymple's Collections, p. 376. &c.—Anderson's Diplomata, No 11. 17. 23. 24.

† Pittscottie, p. 101. 102. 103.—Parl. 1455, ch. 44.—Parl. 1481, ch. 100.—Rymer, ii. 1024.

immediately before the Union*. A surrender of lands, objects which always were resignable, implied a surrender of all the rights incorporated into them. Titles, which had been conferred on estates, were not only deemed too insignificant to be specially mentioned, but even imagined to be inseparable from them. As their possessors could vary their styles at pleasure, men were thought to be entitled to lay them aside altogether, or to divest themselves, without leave of the Sovereign: And, from a confusion of ideas caused by habit, which rarely distinguishes with accuracy, that practice continued long after personal peerages had acquired their proper form, and the custom had thereby been rendered preposterous.

V. It proceeded from like causes, that noblemen used, even after 1587, to include in their settlements their honours as well as their lands. Those conveyances, before that aera, had been devises rather of estates to which dignities were annexed, than of the dignities themselves; and, therefore, their validity and effects were limited only by the restraints imposed on alienation by the feudal law: But, after Peerages had been introduced, deeds, by which private persons directed their descent, became incongruous to their nature, and accordingly were adjudged in 1633 to be ineffectual†; yet they continued still to be made‡. Even in 1747 the magnificent Marischal Earl of Stair executed a deed, (which
was

* Lovat's State of Instances, p. 5. title *Lindsay*.—His Remarks, p. 56.—Ad. Case, ch. 6. p. 137. 149.—Brief, p. 60.—Act (not printed) of Parl. 1707, concerning the peerage of Gray.—Cases exhibited in 1748 to the House of Peers in behalf of the claimants of the peerage of Stair.

† 11th July 1633, *Oliphant v. Oliphant*.

‡ P. 236. above.—Sup. Case, p. 14.

was afterwards declared to be invalid) nominating his nephew John Dalrymple to succeed him in his title*. The crown was not however bound, in later as in former times, either to alter the destination of Peerages in terms agreeable to those settlements, or even to accept of resignations of honours†.

VI. The Court of Session, the supreme judicature established in Scotland to determine in most questions of property, and invested with an exclusive authority to judge concerning landed estates, exercised a jurisdiction in competitions about peerages. Claims entered to them were held, after, as well as before, the Union, to fall within its ordinary department. In 1730, that court judged in the suit brought for ascertaining the person who had right to the Lordship of Lovat; and a doubt seems not then to have been entertained, either on the bench or at the bar, concerning their power to take cognisance of the matter. It was only lately that Scottish lawyers were taught to number, among the privileges acquired to the peers of Scotland by the treaty of Union, that of subjecting their pretensions to those dignities to the arbitrary decision of the crown.

VII. In ancient charters, by which lands were raised to honours, place or rank is sometimes enumerated among the pre-eminences implied in them; and the terms used in those deeds, however apt in some cases to be misunderstood at present, will constantly be found, if attentively considered, to mean no more than
precedency

* 4th May 1748.—Cases of the claimants of the peerage of Stair, in 1748.

† Fountainhall's Decisions, 28th March 1707, Lady Mary Bruce v. the Earl of Kincardine.

precedency or degree. A seat in parliament, an object in itself little valued, as well as implied in every freehold, I dare not assert positively, I believe however, was never given or expressed. But, after peerages had been disjoined from fiefs in 1587, a right to sit and to vote in that assembly, as well as a title corresponding to their dignity, began to be expressly conferred, even in charters granted for re-investing their owners in estates which had already been ennobled, no less than in those by which nobility was originally bestowed upon them, especially in cases in which either the heir was not descended from the nobleman who had possessed the peerage in 1587, or his succession was not entirely exempt from objection.

In a charter granted in 1591 to James Hay of Yester, who had succeeded his brother William Lord Hay in the Lordship and estate of Yester, both a vote and the dignity are given to James *.

Another charter, by which James VI. in 1595 granted the Earldom or estate of Athole to Lord Innermeath, is couched in similar terms †.

Mary Douglas, stiled Countess of Buchan, married James Erskine, a son of the Earl of Marre, who, according to the courtesy still prevalent in his time, assumed the title of Earl of Buchan ; but, as his pretensions to this dignity, and even those of his wife, were not perfectly inexceptionable, the rights pertaining to
it

* See notes [L. and M.] at the end of the volume.

† P. 199. above.

it were expressly conferred on himself, and his heirs-male, in a charter of the Earldom granted in their favour in 1617*.

VIII. Patents, by which peerages disconnected from lands, or peerages only, are granted, and by which they may be bestowed on persons not possessed of a perch of ground, were not used in Scotland before the days of James VI. †. Before 1587, they were not necessary to the acquiring of seats in parliament; perhaps were not constitutional modes of arriving at them.

IX. Before his reign many suits were brought there about estates, noble as well as ignoble, and about other sorts of property: But, in the whole annals of Scottish jurisprudence, your Lordship will not find a single competition about a peerage, or even a title, before that which was brought in the Court of Session in 1633 concerning the dignity of Oliphant.

X. It seems to be certain that an order of nobility, distinguished by the title of Lord, existed anciently in Scotland ‡, and that people were advanced to this degree, either by erecting their estates into Lordships ||, or by investiture given in parliament. Nevertheless, it is not unlikely that the rank, as well as the title, was sometimes assumed spontaneously without any authority, except courtesy, acquiescence, custom, and acknowledgement.

The

* See note [M.] at the end of the volume.

† P. 55. above.

‡ Parl. 1483, ch. 108. § 4. — Parl. 1488, ch. 2. 3. — Parl. 1493, ch. 72. — Parl. 1540, ch. 56. 57. 62.

|| Charter of the Lordship of Hamilton, cited p. 171. above.

The title, or rather the appellative, DOMINUS, LORD, does not always signify a nobleman, but seems, of old, to have been allowed to every owner of land †. The word LAIRD, by which you mean a proprietor of ground, is only Scottish for Lord ‡. Dominium denotes an estate, as well as a Lordship || : And in Latin mere Lairds are often described in terms exactly the same with noble Lords §. Hence it cannot always be affirmed with assurance, that, in every case in which an estate is termed a Dominium, its owner was a nobleman ; and it is sometimes difficult to distinguish the Domini who were noble from those who were only commoners.

Lords were commonly described by placing their title, DOMINUS, immediately before their stile, and after their Christian name ; and Lairds, it is said, were distinguished by inserting the preposition DE, OF, between their stile and the word DOMINUS subjoined to their name **: Forms which are abundantly distinct ; but they seem not †† to have been constantly observed.

I i

In

† Parl. 1424, ch. 14. 19. 22. 30. 37.—Parl. 1429, ch. 133. 140.—Parl. 1449, ch. 17.—Parl. 1457, ch. 89.—Parl. 1467, ch. 44.—Parl. 1474, ch. 73.—In the list of the jurymen who sat on the trial of Lord Lyle, John Drummond of Stobhall is described Dominus de Stobhall. See note [N.] at the end of the volume.

‡ In the Scottish dialect, *a*, or *ai*, is often pronounced and written for *o*, or *oa*. They say Pape, and Paibe, for Pope, aith for oath, faire for fore, aits for oats.

|| Charter, 1370, of the Earldom of Ross, cited in Suth. Appen. No. 3.—Ad. Cafe, ch. 5. p. 27.—Precept, 1516, and charter, 1525, cited in Ad. Appen. p. 3.—Charter of Levenax, 1385, cited in Ad. Cafe, ch. 5. p. 41.—Parl. 1455, p. 36.

§ Lovat's Mem. p. 18. 19.—Mackenzie's Answers to it, p. 18. 19. 22.—Mackenzie's Inform. p. 3. 5.

** Keith, p. 216. 222. 226. 305.—Essay, HONOUR, DIGNITY.

†† Keith, Appendix, p. 18.—Fordun, xvi. 10. 11.—Major, vi. 12.—Rymer, x. 688. 695.—Compare Parl. 1572, ch. 1. with Parl. 1579, ch. 2. 27.

In Scotland it was common for the Lairds to take siles from their lands, and they were both described and addressed by those siles *. Their wives, too, were denominated Ladies, and the siles, or names of the estates, of their husbands, were subjoined immediately after that title; fashions which are not yet entirely obliterated. Lindsay, the historian of the Jameses, is best known under the appellation of Pittscottie; Drummond, author of the droll macaronic poem, Polemo-Middinia, is commonly named Hawthornden; and under these titles their works are generally mentioned. Lady Macintosh, and Lady Macleod, are well known in the north, no less than Lochiel or Macfarlane. Barony and Baron are often synonymised by Lordship and Lord †: But, in the Scottish statutes, after the year 1587, you will hardly meet with a single instance in which those orders are confounded with each other.

In consequence of the laws, which granted a dispensation from attendance in parliament to those freeholders whose estates amounted not to the value specified in the acts, a distinction was introduced between the great Barons and the small Barons. "All" were accounted great Barons," says Stair, "who held an hundred marc land, or above, of the King; and the rest meaner" Barons ‡:" And in a statute no older than 1540, such as possessed a hundred pounds of yearly rent are denominated Great Landed Men §. The faces of those who were enabled, by fortune,

* Parl. 1704, ch. 4.

† Parl. 1503, ch. 128.

‡ B. 2. t. 3. § 2.

§ Parl. 1540, ch. 57.

tune, to attend regularly, were rendered by acquaintance familiar in that assembly: The doors would more readily be thrown open at their approach: More respect would naturally be shewn them: A closer connection seemed thereby to be established between them and the house; and from the superior frequency with which they were beheld in conjunction with it, they came to be thought to possess a stronger right to seats than others whose appearance was rare in the senate.

The title commonly given to those who sit in conventions of dignity, to which a great number, if not a considerable majority, of the members were entitled by custom, would naturally accompany them out of court. All who attended were, in general, denominated by one common appellation, Lords of Parliament*: And it is not improbable, that, from the long possession attained in that manner, some Lords, whose right had originated in usurpation, arrived at last at a firm hold of nobility.

Craig, an able lawyer, and an elegant writer, who was born forty years before 1587, and who, probably, at an early age, was the Deputy Justiciary that in 1567 presided at the trial of the murderers of King Henry, assigns to this order an origin exceedingly similar to that here given †.

I i 2

Several

* Parl. 1434, ch. 153.—Parl. 1452, ch. 28. 29.—Parl. 1455, p. 36.—Parl. 1467, ch. 33.—Parl. 1471, ch. 53. 54.—Parl. 1488. ch. 14.—Pitfcottie, p. 27.

† Quaeret aliquis unde haec vox, LORDS, derivata sit, quemque locum dignitatis in republica habeat? Sane hi a principio nihil nisi Barones erant, nec adhuc sunt. Nomen tamen hinc provenit, quod cum jure regni omnes Barones publicis comitiis interesse tenerentur, nec tamen cum interessent, propter multitudinem, omnium suffragia colligi possent,

Several noblemen, whose persons appear not either from history or from record to have been ennobled by investiture, and whose estates seem not to have been erected into Lordships, are found bearing the denomination corresponding to that degree. Perhaps the honours of Borthwick and of Lovat were gradually acquired from this source.

The order of Lords was later of being imported into Scotland than that of Earls; probably not till the reign of James I. Domini are not enumerated among those who, in ancient times, were either summoned to Parliament * or attended in it: And none of them can carry their antiquity higher than the accession of that Prince.

The tenth chapter of the sixteenth book of Fordun seems to be the first passage of any old author, in which the different degrees of nobility are accurately distinguished from each other †. There you will find a list of the jurors who were impanelled on the trial

possent, ex singulis provinciis unus aut duo eligebantur, qui publica regni negotia cum rege tractarent; et in initio digniores, et rerum tractandarum peritiores deligebantur, qui etiam Domini salutabantur. Sed degenerantibus seculis, cum comitia essent frequentiora, nempe in quibus magna pars causarum decideretur, nec tenuiores in sumptus sufficere possent, factum est ut potentiores pro peritioribus substituerentur. Quod si Comitibus prorogabantur, etiam durante tota vita hi potentiores dignitatem retinebant: Sic etiam finitis Comitibus (ut primum semper humanum genus in adulationem est) Dominorum nomen retinebant, et iis vita functis, heredes, cum eandem potentiam haberent, aegre etiam a se nomen dimittebant. Sic progressu temporis factum, ut qui prius Commissarii tantum Baronum essent, in Dominorum numerum, quoties publica Comitibus indicebantur, sint co-optati; L. 1. d. 12. § 18.—See title prefixed to the acts of the third parliament of James I. quoted p. 215. above.

* See note [A.] at the end of the volume.

† See note [N.] at the end of the volume.

trial of the Earl of Athole, and the Lords are distinctly separated both from the Earls and from the Knights. Those there termed Domini could not mean Lairds, as the whole jury consisted of landed men.

XI. Hence a conjecture may be formed about the way in which the judges of the Court of Session were led to assume titles and titles as if they had been Lords Baron. This court, instituted by Parliament in 1532, succeeded to that moveable tribunal, which had consisted of those termed Lords of Session, or Lords of Council. In the statutes erecting it the title of Lord is given to the senators who compose it also *: The judgements pronounced by them are all made under the laconic denomination of THE LORDS: Some addition to that title was necessary to distinguish them from each other; and it was not unnatural, for this purpose, to add immediately after their title the title by which, according to the fashion of the nation, they had been commonly called before their preferment; just as in England the surname of each judge is added at present to the word Justice or Baron. An appellation, then unimportant and not even vain, I will not say durst not be refused in a narrow country, but would not be envied to wealthy men raised to their arbitrary station †. In the records

* Hawthornden, p. 256.—Parl. 1457, ch. 68. 70.—Parl. 1491, ch. 56.—Parl. 1503, ch. 92.—Parl. 1532, ch. 6. § 5. 6. 7. 8. 12. 14. 15. 16. 18. 19. &c.

† Parl. 1457, ch. 70.—Parl. 1532, ch. 6. § 1. 4.—*Ea controversia tenuit a V. Idus Martii usque ad VIII. Calendas Maias, quo die Collegium Judicum Edinburgi constitutum est. Ab iis cum ab initio multa utiliter essent excogitata, ut jus æquabile diceretur, tamen qui sperabatur eventus non est consecutus. Nam, cum in Scotia nullae pene sint leges præter conventuum decreta, eaque pleraque non in perpetuum, sed in tempus facta, iudicesque, quod in se est, lationem legum impediunt, omnium civium bona quindecim*

cords of the College, a stile is assigned to the President as well as to the other Lords ; but he is not addressed or commonly known by it : His appellation both in court and out of it is Lord President ; a proof, that this denomination was imagined to import more dignity than a title, which would now seem higher, but which was then hackneyed by every Laird from John-O'-Grot's-House to the Mull of Galloway.

XII. Not only were commoners both addressed and described in conversation by the names of their lands, but it was not unusual for them to sign letters and even deeds by their stiles ; a practice which was not prohibited, till in 1672 it was declared by a statute * to be lawful only for noblemen and for bishops to subscribe by their titles. BLAIRQUHAN, MOCHRUM, JOHNSTON, LOCHINVAR, BOMBY, and many other commoners, are found among those who, after having deprived Queen Mary of the Scottish crown, entered in 1567 into a bond, by which they engaged to support the authority of her infant son, whom they had raised in her room to the throne †. Next year, after that princess had effected her escape out of the castle of Loughleevin by the assistance of George Douglas, on whose youthful heart her exquisite beauty and rare accomplishments had made a deeper and more powerful

Decim hominum arbitrio sunt commissa, quibus et perpetua est potestas, et imperium plane tyrannicum, quippe quorum arbitria sola sunt pro legibus.—Buchanan, xiv. 43.—See Leslie, ad an. 1532—1533.—Stair, B. 4. t. 1. § 52. 53. 54. 55. &c.—Macdouall, B. 4. t. 7. § 15.—Erskine, B. 1. t. 3. § 20.—Dirleton's Doubts, word *Session*.—Acts of federunt, 17th June 1674, and 25th Jan. 1676.

* Parl. 1672, ch. 21.

† Appendix to Crawford's Officers of State.—Keith, p. 434.—Anderson's Collections, v. 2.—See also Keith, advertisement, p. 10.

ful impresson than even strong and interesting ties*, and for whom too it is not improbable that, by acceptable services, a mutual passion had been engendered in her unresisting breast †, a similar deed was executed by her partizans, and among the subscribers of it are found BASS, ROSLIN, BALWERY, CLACKMANNAN, INNERWICK, and many others of their order ‡. The famous obligation, emphatically termed, on account of the awful engagements contracted in it, the Solemn League and Covenant, which, Hume || says, all ranks, conditions, ages, and sexes flocked to subscribe, was also signed by many commoners, DUNLOP, BISHOPTOWNE, FULLERTON, ROWALLAN, with their stiles only. The violences consequent on that formidable association are well known: And the commission, which was granted in 1640 by a committee of Parliament to commissioners to treat, first at Rippon, and afterwards at London, on the part of Scotland, by whom a treaty was accordingly concluded, with commissioners nominated on behalf of England, was signed, after the same fashion, by RICCARTON, CAPRINGTON, GAITGIRTH, DUNDAS, all commoners §.

XIII. Barony, Lordship, Earldom, are denominations which ascend gradually above each other. Nevertheless, the same proprietary jurisdiction and feudal privileges are implied in all of them ;

* George Douglas was a brother, by the mother, both of Murray the Regent, and of Douglas of Loughleevin, the owner of that fortress.

† Keith, p. 469.

‡ Keith, p. 476.

|| Hume, ch. 53.

§ Parl. 1641, ch. 6.—Hume, ch. 53.

them *; and, as they differ only in name, your Lordship will often find them mentioned in ancient charters and even in statutes, as if little or no disparity had intervened between them. Almost every Barony is also termed a *Dominium*, and even sometimes Earldoms, as if the terms had been synonymous †: Yet it is certain that Baronies were often incorporated into Lordships, that Earldoms were erected out of both, and that estates were understood to be thereby exalted in rank and in denomination.

XIV. In Scotland a nearer approach in dignity was always made to the nobles by the inferior holders of land than in other countries. Even in modern statutes Knights, and Barons, and landed men, are denominated Noblemen ‡.

The fine originally imposed on each member who neglected to attend Parliament was ten pounds Scottish, without distinction either of rank or of estate ||. In 1587 that penalty was increased to a hundred marks on a Burgeſs, a hundred pounds on a Prelate, two hundred pounds on a Lord, and three hundred on an Earl; but in the statutory words of the act, establishing the alteration, no mention is made of freeholders, or even of Barons. Either from the rarity of their appearances in that convention, they had been

* P. 47. 48. 51. above.

† Parl. 1503, ch. 128.—Lovat's Ad. Cond. p. 8.—His Infor. p. 3. 5. 25. 26. 32.—His Remarks on Mackenzie's Infor. p. 4. 5. 19.—Precept, (1516) and charter 1525, cited in Suth. Append.—Ad. Cafe, ch. 4. p. 57. ch. 5. p. 27. 28. 41. ch. 6. p. 99.—Sup. Cafe, p. 18.

‡ Parl. 1540, ch. 57. 80.

|| See note [A.] at the end of the volume.

been entirely forgotten, (a supposition contradicted by the preamble of the statute) or they were included under the description of Lords; a proof that little distinction was then made between these different orders. Accordingly, LORD OR BARON, notwithstanding that they are not convertible terms, are the words used in the first line of that law *. But, in 1617, thirty years after inelective seats had been bestowed on the Peers, and counties had become obliged to serve by representatives, an act was passed, imposing on commissioners of Barons a mulct of a hundred pounds for absence †. A like distinction is found in subsequent statutes ‡.

XV. People engaged in active life, especially if raised by good fortune to envied stations, assuming superior airs ill becoming their vulgar understandings, are apt, from ignorance and from vanity, to affect an insolent contempt of abstract observation, whose depth, piercing to the remote and primary causes of political customs and institutions, they are often disabled by their own shallowness fully to penetrate: Yet the influence of the imagination, even in giving stability to government, and in ensuring submission to its decrees by inspiring a reverence for the persons who administer it, is a fact completely attested by experience, and indeed obvious to the most heedless observer. All dominion, the most despotic and the most military, no less than the most free and the most popular, says a profound writer, is ultimately founded not on force, which, even in the case of armies, is always lodged in the many, but on fancy or opinion, operating on them in favour of the few. Hence splendid robes and grotesque dresses

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fes

* Parl. 1587, ch. 34.—Parl. 1457, ch. 91.

† Parl. 1617, ch. 7.

‡ Parl. 1690, ch. 1.

ses make no mean figure among those cunning contrivances which, in almost all ages and in all nations, have been employed by kings, priests, magistrates, and even judges, to excite astonishment, to confound reason, and to inspire awe in the minds of the people who behold them. In the Scottish Parliament, peculiar robes were worn on solemn occasions by each estate. In 1455 brown mantles, with little hoods to recline on the shoulders, open before, lined with white fur, and faced with it a hand-breadth broad down to the belt, were assigned to Earls: The other Lords of Parliament were appointed to be arrayed in red mantles, with red hoods, open before, either lined with silk, or furred with a border purled of cristy gray Greece or purray *: And burgeses were ordered to wear blue cloaks, with blue hoods, furred a foot deep, with an open on the right shoulder also furred. No garb is given there to the Barons or Freeholders †.

Another statute, ratifying that made in 1455, was passed in the year 1457; and the parliamentary robes are ordered by it to be fashioned after patterns which the Sovereign was authorised to provide. The only persons mentioned there are Earls, Lords of Parliament, Commissioners of Boroughs, and Men of Law ‡: But it cannot be supposed that an ornament, allowed to burgeses, was intended not to be bestowed on proprietors of land.

In

* The words of the act are, "cristy gray grece or purray." Their meaning, or the objects intended by them, I have not been able to discover: But a conjecture may be formed about some of them, from an accompt rendered in 1474 by the Bishop of Glasgow, then High Treasurer of Scotland, of which a copy is given in Maitland, p. 322.—See also Parl. 1429, ch. 133.—"Christ's Kirk on the Green," a song ascribed to James I.

† Parl. 1455, ch. 52.

‡ Parl. 1457, ch. 76.

In 1587, different garbs, agreeable to the patterns which probably had then been prepared, were again ordered to be used by the three estates; and from the expressions, however inaccurate, employed in the act passed on this occasion, one should conclude, that only three different models had been formed, and that all the individuals belonging to each estate, whether noblemen or commoners, had been apparelled precisely after the same fashion.

These repeated injunctions, enforced as they were by the imposition of penalties, and even by threats of exclusion, seem never to have been carried into full or exact execution *. Robes were at last got by the nobility: The Dukes and the Earls, as well as the Lords, wore scarlet, ornamented with bars of ermine; a Duke with five, an Earl with four, a Lord with three: But no distinct habit was ever assumed by the Burgeffes, or even by the Barons †.

XVI. Among the Romans, a man, whose fortune entitled ‡ him to a horse, was placed by the constitution in a rank superior to the populace; and FOOTMAN is the name used by the Greeks to express a slave §. In Scotland, neither ability to maintain, nor the fact of keeping a horse, marked any order of the citizens; but a more just, and even a more political rule took place. Every person who, with money earned by industry or acquired by succession, could afford it, was allowed that convenience: And in the Scottish armies, almost all who could obtain it were wont to

K k 2

perform

* Parl. 1609, ch. 8.

† Mackenzie's Observ. on Parl. 1455, ch. 52.—and Parl. 1587, ch. 38.—Arnot, p. 617.

‡ Tit. Liv. I. 43.—Sueton. in Caesar. 33. in August. 40.—Plin. 33. 2.

§ Ανδράποδον.

perform their marches carried on that animal, which is equally serviceable in pursuit and in flight, against fatigue and for health. The destruction caused to the crops on the ground by the multitude of horses which were brought to the field; and the confusion and incumbrance created in the host by their number and unwieldiness, together with the difficulty often found in subsisting, and the attention necessary to be employed on them, at last obliged that important article to become an object of parliamentary regulation. In 1540, every individual was still permitted, by a statute, to ride to the place at which the troops were required to assemble: But all the soldiers, officers as well as privates, were ordered, on their arrival at the rendezvous, to return their horses, and to proceed on foot. Some indulgence, however, was granted to a few, on whom this hardship was reckoned improper to be imposed; and Barons, or great landed men, were permitted, as well as Earls and Lords, to march on horseback *. A similar distinction was made in the weight and the splendour of their harness, and perhaps in the nature and the kind of their weapons †.

XVII. In most nations, in which the causes, that tend to the encouragement of industry and to the aggrandisement of society, are not distinctly understood, those pernicious remedies, sumptuary laws, have been passed. In inexperienced times, a few years before 1587, people, whose income amounted not to two thousand marcs, or fifty chalders of corn, clear a year, were forbidden among us by legislature to wear gold, silver, velvet, satin, damask, taffetas, embroidery, fringes, lawn, cambrick, or even woollen imported from foreign countries. Knights, however, and landed

* Parl. 1540, ch. 56.

† Parl. 1540, ch. 57.

landed gentlemen, as well as Dukes, Earls, and Lords, of adequate fortunes, were allowed these fineries*.

XVIII. Of all the inventions of vanity, perhaps the most frivolous are ensigns armorial; but, considered in a philosophic view, they afford to profound thinkers, who delight to examine the mechanism of the mind, a curious example of that powerful principle termed association of ideas†, by which thought is continually led in its progress, and one image presents to the fancy another which has been discovered by experience, or which is supposed, from habit, to be connected with it. Those badges, it is probable, were originally personal, being intended to distinguish persons by whom martial achievements or noble deeds had been performed, and were adorned, perhaps, with designs or emblems ingeniously expressive of the actions which had procured them; but, forming a part of the estates of the persons who had obtained them, and at their deaths passing to their heirs, became relicks, respected and precious, which, connecting their possessors with those on whom they had originally been bestowed, men would be proud to display: And they would be carefully preserved on that account, as the fancies of those to whom they were shown, as well as of those to whom they pertained, would be conveyed by them, with quickness and with vivacity‡, to the persons who had achieved them. Arms came thereby to be converted into marks of descent; and obscure hieroglyphics were gradually substituted for solid instruments adorned for show, but made for use. Hence ranks, as well

* Parl. 1581, ch. 18.

† The chief foundation of David Hume's ingenious speculations about moral evidence and human passions.

‡ P. 128. 129. 130. 167. 168. above.

well as pedigrees, were distinguished by fanciful conceits; and a jargon, adapted, both by its mysteriousness, and by its harshness, to puzzle and to amaze, was invented to express its vain aenigmas.

In England, the technical terms, employed in Heraldry to express tints, rise with the rank of the persons to whom they are assigned. The arms of noblemen are blazoned there with precious stones; topaz, pearl, diamond, ruby, sapphire, emerald, amethyst, jacinth, sardonix: Those of princes by the great luminaries of heaven; Sol, Luna, Saturn, Mars, Jupiter, Venus, Mercury, Dragon's head, Dragon's tail: But this distinction is not observed in Scotland. Among us, in blazoning the arms of the gentry, the same language has always been used as in describing those of the nobility*.

XIX. The arms of those who were admitted to engage at tournaments, during the time they were suspended in expectation of challenges, were attended by Esquires; they were also displayed some time before the encounter, to vouch the rank of their Lords; and, at advancing to combat, they were carried by Squires, who marched by the sides of the combatants. Supporters, a badge esteemed peculiarly honourable among those learned in heraldry, are limited, by the Doctors in that vain science, to persons who either are noble in the strict sense of this word, or at least are advanced to honours which require, that, at their installation, they be conducted to the Sovereign by two persons of like high quality. But, in Scotland, many commoners, not possessed of either title, carry their arms supported by bearers. Not only are the
chiefs

* Mackenzie, ch. 4.—Nisbet, v. I. ch. 4.—Guillim.

chiefs of names all possessed of that patent mark of superior dignity; several inferior families have been prompted, by a mean vanity, to aspire to an empty honour, which, with them, can only serve to make spectators recollect that their birth denies them pretensions to it *.

XX. In most countries, those elevated by their high rank into hereditary counsellors, and even peers of the crown, have been distinguished above inferior orders by an ornament something resembling the diadem of royalty: But in Scotland the nobility seem not, in ancient times, to have been discriminated from the commons in that manner. In old registers, in old seals, in old buildings, the arms, even of Earls, are not embellished with coronets; a distinction which probably was not assumed by them before the days of James V: And it was only in 1665 that these embellishments were granted to Lords †.

XXI. During the reign of Charles II. the Scottish Parliament, infected by a narrow system, made an act ‡, restraining the expences of marriages, of baptisms, and of burials. Lord Fountainhall, whose reports are full of anecdotes, after relating, in the short strictures left by him on that Parliament, that the noblemen, offended because the bishops wives in the bill had been termed Ladies, resolved, in order to teach them humility, to suffer their ladies to be termed Wives, takes notice, that an altercation arose

* Mackenzie, ch. 31.—Nisbet, v. 2. p. 4: ch. 7.

† See a register of arms, done dy Sir David Lindsay of the Mount, Lion King at arms, in 1542.

‡ Parl. 1681, ch. 14.

rose in the House about allowing the funerals of the small Barons to be attended by an equal number of mourners as those of the great Barons ; and that on this occasion Tarbat, the learned antiquary, who was afterwards created Earl of Cromarty, but who was then a commoner, replied in a heat, " That the Lords ought to remember they were all ranked in one state ; and that himself had, under the great seal, a right to bury under a canopy *."

XXII. In Scotland a greater equality was always maintained between the gentry and the nobility, than in other countries in which ranks were more early distinguished with an exact precision. Landed gentlemen deemed themselves, and were even held by law, little inferior to Peers ; and that parity discovered itself in articles more important than any which have hitherto been mentioned.

Among the artifices employed to maintain superiors in their authority, and vassals dependent upon them, the feudal law invested Lords with a power of controlling those, who held lands of them by military tenure, in an article in itself uncommonly delicate to every mind of sensibility, and important indeed to the happiness of life. A superior was legally entitled to offer a woman in marriage to his vassal, and the vassal, if he married another after a requisition had been formally made on him, forfeited to his Lord double the portion which it might reasonably be supposed he should have got by his wife. This barbarous custom was plainly calculated, among other things, to restrain feudataries from contracting alliances with families at enmity with those of
their

* V. i. p. 153.

their Lords, and was tolerated in North Britain till the species of tenure which implied it had been abolished by legislature in 1747*: But its brutality was somewhat mitigated even in ancient times, because the superior, in order to be entitled to the incident, was bound to offer a match of which it would not be beneath his vassal to accept. Equality was estimated here not by fortune, but by rank and by quality, and all freeholders were held equally noble. It was not accounted any disparagement to offer the daughter of a commoner, possessed of property in land, to an Earl or even to a higher dignity. A gentleman's daughter was reckoned a match for a Peer, and it was not imagined that either his blood would be contaminated, or his dignity would be affronted by that connection†.

XXIII. The Scottish nobility never arrived at several distinctions which are now held to belong to their order. Noblemen, as well as commoners, were obliged to attend the judges on their circuits‡: It was not till the year 1710 that they were discharged from performance of this obligation||. They were even bound, in the character of freeholders according to their tenures, to give suit and presence in the head courts of the sheriffs of their counties§, perhaps under an honorary exception made in an old statute** in favour of Bishops, of Abbots, and of Earls, who were permitted to attend by their stewards.

L 1

XXIV.

* 20mo G. II. c. 50.

† Craig, L. 2. d. 21. § 25.—Stair, B. 2. t. 4. § 59.—Macdouall, B. 2. t. 4. § 59.

‡ Stat. Wil. c. 2. § 1.—Justice Air, T. 9. ch. 17. 18.—Parl. 1489, ch. 33.—Parl. 1587, ch. 82.—Keith, p. 198. 199.—Skene, word *Iter*.

|| 8vo Annae, c. 14.

§ Parl. 1429, ch. 144.—Parl. 1540, ch. 41.

** Stat. Wil. c. 2. § 3.

XXIV. In ancient times, the heirs apparent of noblemen were not discriminated, according to the ranks of their fathers, by the title of Marquis, of Earl, of Viscount, or of Lord, but were commonly distinguished by the appellation of MASTER. The Earl of Arran, son of the Duke of Chatelherault, who was Regent during the minority of Queen Mary, seems to be the first that in Scotland assumed a denomination of Peerage. Murdoc, son of the Duke of Albany, appears indeed, in England, to have sometimes been termed Earl of Fife * ; but, though a prince of the blood, even he was oftener denominated Master of Fife, or simply Murdoc of Fife † : And the old fashion continued long after the beginning of the seventeenth century ‡.

XXV. Before 1587 the eldest sons of noblemen were not disabled, more than those of commoners, to sit in the legislative assembly. Among the members who sat in 1560, your Lordship will find the Master of Marischal, the Master of Glencairn, the Master of Lindsay, the Master of Sinclair ||, &c. But, after the constitution of Parliament had been reformed in that year, the consequences of representation, the nature of peerages, and their distinction above the rights of commoners, disclosed themselves by degrees, and a disability was imposed, from the nobility of their fathers, on the eldest sons of Peers. Hence, on the advancement of Sir George Mackenzie to the dignity of Viscount of Tarbat, a writ was issued in 1685 to the freeholders of Ross-shire to elect another commissioner in room of his son, who had been incapacitated

* Rymer, ix. 2. 286.

† Rymer, ix. 48. 125. 244. 250.

‡ Pittscottie, p. 356. 368. 379.—Parl. 1488, ch. 8.

|| Keith, p. 146.

citated by that promotion. In the grand convention of estates, Lord Livingston, eldest son of the Earl of Linlithgow, was on that account adjudged in 1689 to be incapable to represent the borough of Linlithgow; and William Higgins a schoolmaster, who afterwards became minister of Tweedsmoor in Tweeddale, was found to have been duly elected *. In 1708, Lord Johnston, eldest son of the Marquis of Annandale, was appointed commissioner for the county of Linlithgow, and Lord Haddo, eldest son of the Earl of Aberdeen, was chosen to represent Aberdeenshire: But, after a full argument on their eligibility, a motion was made in the House of Commons, “ That the eldest sons of the Peers of
 “ Scotland were capable, by the laws of Scotland at the time of
 “ the Union, to elect or be elected commissioners for shires or bo-
 “ roughs to the Parliament of Scotland; and, therefore, by the
 “ treaty of Union, are capable to elect or be elected to represent
 “ any shire or borough in Scotland to sit in the House of Com-
 “ mons of Great Britain;” and a question put on this motion passed in the negative. Next day, new writs were ordered for electing other commissioners in room of those noblemen †.

Dec. 3. 1708.

Dec. 4. 1708.

XXVI. It is a maxim established in the feudal law, that all criminals must be tried by their equals; but either the nobles of Scotland were deprived of that right, or landed men were held to be fully their Peers. Not only were they triable for crimes by the ordinary judges by whom other offenders were tried; the persons impannelled on their juries were not required to be noblemen. In the trials of the Duke of Albany, of the Earl of Len-

L 1 2

nox,

* Records of Parl. 23d April 1685.—Records of Parl. 18th March 1689, cited in the journals of the House of Commons, 27th Nov. 1708.

† Journals of the House of Commons.—Scot's History of Scotland, p. 746.

nox, of Lord Lyle, of the Earl of Bothwell, of the Earl of Morton, of the Earl of Gowrie, of Lord Balmerino ; in all the trials of noblemen with which I have met, commoners are found on the inquests*.

XXVII. The privileges of Peerage seem to have been wholly unknown in Scotland. Even at the Revolution the Scottish Peers had not attained an immunity from arrests. Conceptions, indeed, both more correct and more lofty than could be entertained by a people who, till the Restoration, had had no reason to apprehend either the power or the influence of the Crown, began then to be conveyed to the Scots, concerning the vast importance of which the perfect freedom of the legislative guardians of their rights would be to their preservation, and even concerning the political propriety of placing each individual among their legislators, as near as might be, on an exact level with the king. On that account, in the first year of the present century, personal liberty was secured to the members of Parliament by an express clause, inserted in a famous † act, sometimes termed the Great Charter of North Britain. But the protection established by that statute was limited to those who were actually attending their duty during the session of that assembly, as well as granted indiscriminately to the Commons and to the Lords : And it was only in consequence of the communication, which was stipulated to the nobility in the treaty concluded at the Union, of all the privileges enjoyed before it by the Peers of England, that the Peers of Scotland became entitled to a perpetual exemption from personal execution. Hence they were frequently necessitated, no less than other men, to retire in-

to

* See note [N.] at the end of the volume.

† Parl. 1701, ch. 6.

to sanctuaries for shelter ; and protections were often obliged to be supplicated * by them from imprisonment for debt.

* * * * *

My Lord, some of the preceding observations relate to subjects, insignificant and despicable indeed ; Pedigrees, Arms, Supporters, Tinctures, Heraldry ; on which it is almost beneath a man of any understanding to waste the attention of a moment. But trivial facts may sometimes furnish apt proofs, and amusing examples, to confirm or to illustrate general principles ; and your Lordship, on that account, will excuse me for having incidentally presented matters of conceit, and articles of vanity, to your serious consideration. My argument ought to be full. At a great expence of time, of labour, of pleasure, and of spirits, I have now concluded it, out of materials perhaps slender for the fabric reared from them : And, possibly, one benefit may be reaped from my discourse. Those who shall afterwards be called to judge concerning Peerages, I hope, will be somewhat assisted by it to ideas more distinct, and more accurate, than have hitherto been entertained, of the objects about which their judgements are demanded ; and, perhaps, they will also be furnished in some cases with objections sufficient to check attempts which may hereafter be made, after long intervals, to revive antiquated dignities. Obsolete claims are always

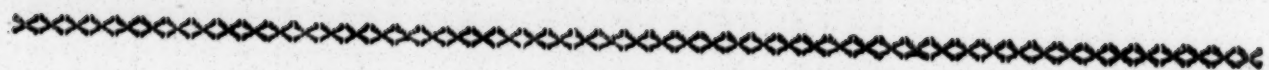
* Parl. 1663, ch. 1. (not printed.)

ways suspicious ; and strong presumptions, almost of themselves decisive, must in every instance lie against them. It is very possible that honours may have been usurped by families who had no right to them ; but it is scarcely supposable that the ancestors of any who pretend to dignities, if their claims had been valid, would have suffered their pretensions to remain dormant for centuries, or even for generations. Their forbearance is of itself sufficient to establish, that they not only were known by others, but knew themselves, not to have a good title to them, and that their claims, if entered, would have been rejected with contempt: And their heirs ought not to be permitted, at a distance of ages, to take advantage of the obscurity in which objects are commonly involved by antiquity, for the purpose of arriving, by means that approach to imposition, at a possession which it cannot easily be believed either they, or their predecessors, had just pretensions to attain.

T H E E N D.



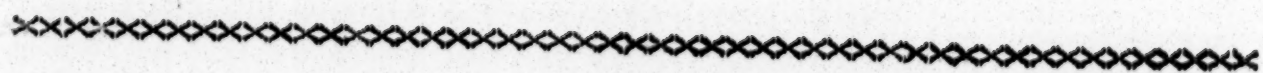
P R O O F S

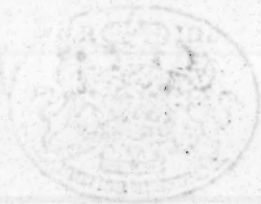


P R O O F S

A N D

I L L U S T R A T I O N S.





PROOFS AND ILLUSTRATIONS.

N O T E [A.] p. 4.—9.

THE justness of the account, given in book first, of the Constitution of the parliament of Scotland, seems to be established by the following proofs.

An Act usually made by the King in Council before calling a Parliament in Scotland.

“ The King’s Majesty, with advice of his council, has ordained a parliament to be proclaimed to begin in the burgh of Edinburgh, the day of for ordering, treating, and concluding, of such great matters as instantly occur concerning the King’s grace, the weal of his realm, and the lieges thereof: Therefore, ordains the Director of the Chancery to direct precepts to all Prelates, Barons, Commissaries, and Bailies of boroughs, and all others our Sovereign Lord’s freeholders within this realm, charging them to appear the said day and place, for their advice to be had in such things as, at that time, shall be proposed to them.” *Essays on British Antiquities*, essay, CONSTITUTION OF PARLIAMENT.—See also Mackenzie’s *Remarks on Lord Lovat’s Answers to Fraserdale’s Condescendence*.

Brief issued on that Act out of Chancery.

“ Jacobus, Dei gratia, Rex Scotorum, Vice-comiti et Ballivis suis de
Argyle, salutem. Quia ordinavimus parliamentum nostrum tenendum apud
M m Edinburgh,

Edinburgh, et inchoandum die Sabbati, octavo die mensis Julii proxime futuri, cum continuatione dierum; vobis praecipimus et mandamus, quatenus summoneatis, seu publice summoneri faciatis, omnes et singulos Episcopos, Abbates, Priores, Comites, et Barones, et caeteros libere-tenentes totius balliae vestrae, et de quolibet burgo tres vel quatuor de sufficientioribus burgensibus sufficientem commissionem habentibus, quod compareant coram nobis, dictis die et loco, in dicto nostro parlamento, una cum aliis regni nostri praelatis, proceribus, et burgorum commissariis, qui tunc ibidem propter hoc intererunt congregati; ad tractandum, concordandum, fubeundum, et determinandum ea quae in dicto nostro parlamento, pro utilitate regni nostri et reipublicae, tractanda fuerint, concordanda, fubeunda, et determinanda: Et vos Vicecomites sitis ibidem dicto die, habentes vobiscum summonitionis vestrae testimonium, et hoc breve: Et hoc sub poena quae competit in hac parte, nullatenus omittatis. Datum sub testimonio nostri magni sigilli, apud Haly-rude-houfe 15to die mensis Maii, anno regni nostri vicesimo 1587.---Vicecomiti et Ballivis suis de Argyle. Pro parlamento." Stair's institutions, B. 4. t. 3. § 16.—See also Essays on British Antiquities, ii.

Title prefixed to the Acts of Robert III.

"Parliamentum Domini nostri Roberti tertii, Scotorum Regis illustrissimi, tentum apud Sconam, die lunae 21mo Februarii, anno gratiae 1400mo, regni sui 11mo, cum continuatione dierum subsequens; summonitis et ibidem vocatis, more solito, Episcopis, Prioribus, Ducibus, Comitibus, Baronibus, Libere-tenentibus, et Burgensibus, qui de Domino nostro tenent in capite."

Title prefixed to the Eighth Parliament of James I.

"In parlamento octavo vel concilio generali illustrissimi Principis Jacobi, Dei gratia Regis Scotiae, tento apud Perth, et inchoato, ratificato, et approbato,

approbato, tanquam sufficienter et debite praemonito, per tres regni status, 12mo die mensis Julii, anno Domini 1428vo, cum continuatione dierum et temporum; summonitis et vocatis, debito modo et more solito, Episcopis, Abbatibus, Prioribus, Comitibus, Baronibus, et omnibus Libere-tenentibus, qui tenent in capite de dicto Domino nostro Rege, et de quolibet burgo regni certis burgenfibus; comparentibus omnibus illis qui debuerunt, voluerunt, et potuerunt interesse; quibusdam vero absentibus, quorum quidam fuerunt legitime excusati; aliis per contumaciam se absentantibus, quorum nomina patent in rotulis sectarum, quorum quilibet adjudicatus fuit in amerciamento decem librarum ob ejus contumaciam."— See also the titles prefixed to the first statutes of Robert I.; to the sixth, seventh, and ninth parliaments of James I.; to the fifth, ninth, and eleventh * parliaments of James II.

That all Prelates, Barons, and Freeholders, shall compear personally in the Parliament.

"Item, It is ordained and statute, that all Prelates, Earls, Barons, and Freeholders of the King, within the realm, since they are holden to give presence in the King's parliament and general council, from henceforth be holden to compear in proper person, and not by a procurator; but, if the procurator allege there, and prove a lawful cause of their absence." Parl. 1425, ch. 58. of the old edition commonly distinguished under the name of the Black Acts.

An act of a Parliament of Robert I.

"Hoc est transcriptum indenturae concordatae et affirmatae inter Dominum Robertum, Dei gratia Regem Scotorum illustrem, et Comites, Barones, Libere-tenentes, communitates burgorum, ac universam communitatem totius regni, magno sigillo regni, et sigillis magnatum et communitatum praedictorum alternatim figillatum in haec verba. Praesens indentura testatur, quod 15mo mensis Julii, anno ab incarnatione Domini

M m 2

1326to,

* P. 36.

1326to, tenente plenum parliamentum suum apud Cambuskenneth fere-
nissimo Principe Domino Roberto, Dei gratia Rege Scotorum illustri;
convenientibus ibidem Comitibus, Baronibus, Burgenfibus, et caeteris om-
nibus Libere-tenentibus regni sui; propositum erat, &c.—Qui omnes et sin-
guli Comites, Barones, Burgenfes, et Libere-tenentes, tam infra libertates
quam extra, de Domino Rege, vel quibuscumque aliis Dominis infra reg-
num mediate vel immediate tenentes, cujuscumque fuerint conditionis,
confiderantes,” &c.; Appendix to Historical Law Tracts, vol. ii.

“ The hail three estates of the realm fitting in plene parliament; that is
to say, the Clergy, Barons, and Commissioners of boroughs, by one assent,
none discrepant, well advised and delivered, have revoked all alienations,”
&c. Parl. 1437, ch. 2.----See Parl. 1493, ch. 72.----Parl. 1584, ch. 3.---
Parl. 1587, ch. 40.---41.

“ Originally with us none had a seat in parliament but those possessed
of a freehold of the King. Thus, the Bishops, Abbots, and Priors, and
likewise the Peers, sat there in respect of their baronies, all nobility and
peerage being of old territorial: And the other freeholders were all en-
titled to sit in parliament, and bound to attend, till the small barons and
freeholders, as a privilege, were exempted from necessity of attendance,
and the freeholders of each shire allowed to choose commissioners to repre-
sent them. I must here remark, that the great * barons and freeholders,
that were dispensed with as to their attendance, were at first declared to be
such as held lands of the King under L. 20; but thereafter, such as were
under 100 marcs.—After the small barons and freeholders were indulged
to appear by their representatives in parliament, some of them still gave
attendance as they might.” Macdouall’s Institute, B. 4. t. 1. § 1.

“ All Barons were equally entitled, as Lords of parliament, to sit and
vote in it; the three estates, consisting of the Clergy, Barons, and Com-
missioners of boroughs.” Macdouall, B. 2. t. 3. f. 8. § 83.

“ Before

* Error for small.

“ Before the union of the crowns we had our own parliament, consisting of the King and three estates, viz. the Bishops, (in times of Episcopacy) with whom the Abbots and Priors were conjoined before the reformation, as the first estate; Peers and Commissioners from shires and stewartries as the second; and the Commissioners from boroughs as the third estate.—The constitution of our parliament varied from that of England in this, that all the estates with us assembled in the Parliament House, in a joint meeting, by the majority of which, in ordinary cases, all matters either in a legislative or judicial procedure were decided; but still the distinction of the three estates was kept up, as is after mentioned.—The particular constitution of our parliament, and the variations it received, were as follows. It consisted of three separate estates, as just said. Each estate had its own proper authority: So that, if the majority of any one of the three estates dissented, no bill could pass into an act of parliament by receiving the royal assent. Wherefore, though they sat all together in one house, yet they were in effect three separate assemblies. Indeed they commonly voted promiscuously: But if any of the estates had expressly taken dissent against the vote, it could not pass into a law. This we are assured was the case by a learned lawyer, who could not be mistaken: And it was declared high treason to impugn any one of the three estates of parliament, which necessarily supposed that each had a distinct authority. Upon the revolution, indeed, the model of our parliament was altered: For the spiritual estate being removed by the abolition of Episcopacy, the commissioners from shires and stewartries, called the Barons or Freeholders, were installed in their room, though formerly joined to the estate of Lords Temporal. Thus the parliament consisted still of three estates, viz. the Lords, Barons, and Burgeses; and each of them had an equal number of members, chosen by themselves, for all committees of parliament: So that the constitution and power of the parliament was still the same, and the dissent of any one of the three estates would have barred any matter proposed from passing into an act.” Macdouall, B. 4. t. 1. f. 1.

“ The

“ The Parliament of old was only the King’s Baron Court, in which all freeholders were obliged to give suit and presence in the same manner that men appear yet at other head courts.—The Parliament is called by proclamation now on forty days, though it may be adjourned by proclamation on twenty days preceding the prefixed day at which it should have met: But of old it was called by brieves out of the Chancellery. It consists of three estates; viz. the Archbishops and Bishops; and, before the Reformation, all Abbots and mitred Priors sat as churchmen. *Secundo*, the Barons, in which estate are comprehended all Dukes, Marquisses, Earls, Viscounts, Lords, and the commissioners for the shires; for of old all Barons, who held of the King, did come: But the estates of lesser Barons not being able to defray this charge, they were allowed to send commissioners for every shire; and generally every shire sends two, who have their charges borne by the shire. *Tertio*, the commissioners for burghs royal, each whereof is allowed one, and the town of Edinburgh two.” Sir George Mackenzie’s Institutions, B. 1. t. 3. Sir George wrote a little before the Revolution.—See Parl. 1427, ch. 112.—Parl. 1449, ch. 26.—Parl. 1457, ch. 85.—Parl. 1489, ch. 33.—Parl. 1503, ch. 113.—Parl. 1587, ch. 114.—Parl. 1633, ch. 1.—Parl. 1690, ch. 3.—Stair, B. 2. t. 3. § 2.—Erskine, B. 1. t. 3. § 2. 3.—Essay, CONSTITUTION OF PARLIAMENT; and Essay, HONOUR, DIGNITY.—Craig, L. 1. d. 7. § 11.—Keith’s History, p. 75.

N O T E [B.] p. 57.

Time about which Earls were first created in Scotland.

IT is commonly supposed, but seems not to be certain, that Earls were first imported into Scotland by Malcom Canmore. Buchanan, whose vast abilities entitle even sceptical doubts, entertained by his penetrating mind,

mind, to more consideration than positive assertions made after laborious researches by any shallow antiquary, talks with great diffidence on the matter *. His master, Major, a faithful writer, does not take any notice of the fact †. Boece, whose elegant stile and correct composition, not to add beautiful genius and fine fancy ‡, are conclusive proofs that his understanding could not be inaccurate or despicable, after observing that Macduff was created Earl of Fife by Malcom, and that the titles of Menteith, Athole, Lennox, Murray, Caithness, Ross, and Angus, were bestowed on others of his partizans, says only that these are the first Earls remembered in our annals ||. Fordun, our oldest historian, who, as well as Boece, Major, and Buchanan, enumerates the splendid privileges which were conferred on the family of Fife, of placing the King of Scotland in his chair of state, and of putting the crown on his head, at the ceremony of his coronation; of commanding the van-guard of the royal army in war; and of making atonement, by a small fine, for unpremeditated slaughter; not only is entirely silent on the introduction of that title, but does not even mention the elevation of Macduff §. Both Earldoms and Baronies are probably more ancient than Malcom, and are frequently mentioned before his accession **.

Fordun affirms, that, in 994, Kenneth III. was killed by Fenele, daughter of Cruchne Earl of Angus ††.

Comites, and even Vice-comites, as well as Barons, are mentioned in the statutes of Malcom II.

In

* VII. 14.

† III. 5.

‡ See his history of Duncan I. in B. xii.

|| Hi primi fuere Comites, quorum nostri meminerunt annales. L. 12.

§ V. 9. &c.

** Nisbet's Heraldry, v. ii. p. 4. ch. 8.

†† IV. 35.

In an authentic deed cited by Sir James Dalrymple*, Ethelred, a son of Malcom Canmore, is termed Earl of Fife, and must have possessed that honour before Macduff, the person who is affirmed to have been raised to it immediately after the accession of that prince.

In some of the oldest writings extant, most of the orders which are yet known, are articulately distinguished in regular gradation; and, among others, Earls, Barons, and sheriffs†, which, instead of novelties that had been lately introduced, seem then to have become familiar in the constitution‡. Anderson has published several charters, granted by David I. a son of Malcom Canmore, which are addressed to the Bishops, Abbots, Earls, Barons, Sheriffs, and all the good men of his whole land||; a distinctness, and a frequency, which they could hardly have attained during the short period that intervened between the restoration of Malcom and the death of his son David, or of William the Lion.

An original charter § is still in being, which establishes, that in 1171 Morgund, son of Gillocherus Earl of Marre, was ascertained by an inquest to have a right to the Earldom of Marre; and that his father, if not his remoter predecessors, had been Earls of Marre. On tolerable evidence, their nobility can be traced even to the days of Malcom Canmore. History reports, that they had been Thanes before his restoration; and I am told that an Earl of Marre, termed Maftoc, is a witness to a donation which this prince made in 1065 to the Culdees of Loughleevin. Maftoc signifies the son of a Thane.

NOTE

* B. 9. p. 225.

† Comites, Barones, et Vice-comites.

‡ Crawford's Officers of State, p. 429. 430. 431.

|| Episcopis, Abbatibus, Comitibus, Baronibus, Vice-comitibus, et omnibus probis hominibus totius terrae suae. *Diplomata*, No. 13. 15. 17. 18. 19. 20.

§ See a copy of it in note [C.]

NOTE [C.] p. 54.—59.

Proofs that the word Comes or Earl meant the owner of a Comitatus or Earldom.

“ QUI a Principe de Ducatu aliquo investitus est, Dux solito more vocatur. Qui vero de Marchia, Marchio dicitur : Dicitur autem Marchia, quia Marcha, ut et plurimum juxta mare fit posita. Qui vero de aliquo comitatu investitus est, Comes appellatur.” L. 2. Feud. c. 10.

“ Item, ordinaverunt, quod nullus Baro, vel Comes, vel aliquis alius, receptabit malefactorem aliquem infra dominationem suam sub poena amissionis curiae in perpetuum.” Stat. Malc. II. ch. 10.—See also ch. 14. § 3. 4. 5.

“ Placitum civile, quod non est criminale quoad vitam et membra, aliud pertinet ad praepositos burgorum et civitatum ; aliud ad curiam Baronum, Comitum, Episcoporum, Abbatum, et aliorum libere-tenentium, qui curias suas proprias habent secundum formam suarum chartarum.” Reg. Maj. l. i. ch. 1. § 4.—ch. 3. § 1. 7.—ch. 4. § 1.

“ Robertus, Dei gratia Rex Scotorum, omnibus probis hominibus totius terrae suae, clericis et laicis, salutem. Sciatis, quod concessimus David Senescalli, militi, filio nostro carissimo, Comitatum de Strathern, cum pertinentiis, tenendum et habendum sibi et heredibus suis, in omnibus et per omnia juxta formam et tenorem cartae sibi exinde confectae, et adeo libere, quiete, plenarie, integre, et honorifice, in omnibus et per omnia, sicut quondam Malisus Comes de Strathern, vel aliquis alius Comes ejus-

N n

dem,

dem, ipsum Comitatum cum pertinentiis aliquo tempore liberius, quietius, plenius, integrius, et honorificentius julte tenuit seu possedit." Charter of Robert II. printed in Appendix ix. to the Brief of Sir Robert Gordon.

" Willielmus, Rex Scotorum, universis Episcopis, Comitibus, Abbatibus, Prioribus, Baronibus, militibus, Thanis, et praepositis, et omnibus aliis probis hominibus totius terrae suae, tam clericis quam laicis, salutem aeternam in Domino. Sciatis, praesentes et futuri, Morgundum, filium Gillocheri quondam Comitis de Marre, in mea praesentia venisse apud Hindhop Burnemuthae in mea nova foresta, primo kalendarum Junii, anno gratiae 1171mo, petendo jus suum de toto Comitatu de Marre, coram communi concilio et exercitu regni Scotiae ibidem congregato: Ego vero cupiens eidem Morgundo, et omnibus aliis, jura facere, secundum petitionem suam jus suum inquisivi per multos viros fide dignos, videlicet per Barones et Thanos regni mei, per quam inquisitionem inveni dictum Morgundum filium et heredem legitimum dicti Gillocheri Comitis de Marre; per quod concessi et reddidi eidem Morgundo totum Comitatum de Marre tanquam jus suum hereditarium, sicut praedictus Gillocherus, pater suus, obiit vestitus et faistus; Tenendum et habendum eidem Morgundo, et heredibus suis, de me et heredibus meis, in feodo et hereditate, cum omnibus pertinentiis, libertatibus, et rectitudinibus suis, adeo libere, quiete, plenarie, et honorifice, sicut aliquis Comes de regno Scotiae liberius, quietius, plenarius, et honorificentius, tenet vel possidet; Faciendo inde ipse et heredes sui mihi et heredibus meis forinsecum servitium, videlicet servitium Scoticanum, sicut antecessores sui mihi et antecessoribus facere consueverunt. Eodem vero die et loco, post homagium suum mihi factum coram communi concilio regni mei, praedictus Morgundus petiit sibi jus fieri de toto Comitatu Moraviae de quo praedictus Gillocherus pater suus obiit vestitus et faistus; super qua petitione sua per quamplures viros fide dignos, Barones, milites, et Thanos regni mei, inquisitionem facere feci, et per illam inquisitionem inveni dictum Morgundum verum et legitimum Heredem de Comitatu Moraviae, et quod eodem tempore propter Guer-

ram

ram inter me et Anglicos graviter fuiffem occupatus, et Moravienfes pro voluntate mea non potuiffem juftificare, dicto Morgundo nullum jus facere potui. Sed cum Gerram inter me et adverfarios meos complere et rebelles Moravienfes superare potero, et dicto Morgundo fibi et heredibus fuis promitto pro me et heredibus meis fideliter et plenarie jus facere de toto Comitatu Moraviae. Et ut hoc factum meum aliis certificaretur, praedicto Morgundo has literas meas dedi patentes. Teſte meipſo, eodem anno, die et loco ſupradicto." Charter published by Selden, Titles of Honour, p. 848.

The Earldom of Wigton, or lands erected into it, were granted by David II. to Malcolm Fleming, and his heirs, under an obligation impoſed on the Earls of rendering to the King the ſervice of five knights or ſoldiers in his army: Faciendo nobis et heredibus noſtris praedictus Malcolmus et heredes fui praedicti, Comites de Wigton, ſervitium quinque militum in exercitu noſtro. *Crawford's Peerage, title WIGTON.*

In a charter of the Earldom of Levenax, granted by James VI. to his grand-uncle Robert Stewart, Robert Stewart and his heirs are conſtituted Earls of that Earldom: Conſtituimus et ordinamus dictum dominum Robertum et heredes ſuos ſubſequent. in Comites dicti Comitatus de Levenax: A phraſe abundantly remarkable to be ſtill uſed in the year 1578. *Brief*, p. 138.—See alſo charter of the Earldom of Murray, published in eſſays concerning Britiſh Antiquities.—Charters of Levenax dated in 1384 and 1385, in the chartulary of Lennox, No. 13. 15.—Ad. Caſe, ch. 5. p. 40. 41.

"The King calling to remembrance how that the Earldom of Murray was reſt from James Creighton, who married the eldeſt daughter of the Earl of Murray, as ſaid is, by the ſubtile craft of William Earl of Douglas, and given to Archibald his brother, he reſtored the ſame to him again: But when James Creighton perceived that he could not joyſe the lands without the hatred of many gentlemen, he again put it in the King's

hand ; and his son thereafter, called George Creighton, in recompensation thereof was made Earl of Caithness." Pitfcottie, p. 93.—Compare Ad. Cafe, ch. 4.

NOTE [D.] p. 65.—70.

Proofs that dignities conferred on lands, on alienation, passed along with the fiefs from the former proprietors to the new acquirers.

" NOBILE autem feudum est, quod possessorem five vassallum nobilitat et inter nobiles sistit.—Sane cum princeps sit fons et origo omnis nobilitatis, sic et inter alios distributor est, et quoties terras cum dignitate confert, licet nobilitatem non exprimat, nobilem tamen facit." Craig, L. 1. d. 12. § 23.—" Amittitur autem in jure nobilitas amisso feudo." Craig, L. 1. d. 12. § 25.—" Ego tamen hic aliquam distinctionem esse adhibendam puto, ut nempe ea tantum feuda a principe concessa nobilitent, quae cum dignitate et jurisdictione conceduntur ; qualia sunt Ducatus, Marchionatus, Comitatus, Baroniae. His enim dignitas et jurisdic-tio inhaeret ; itaque cum ipso feudo nobilitas concessa videtur."—Craig, L. 1. d. 10. § 16.

" Noble fees are those which conferred nobility to persons vested in them." Macdouall, ii. 3. § 83.—" In ancient times, when nobility was founded in feudal dignities, it followed the property of the estate to which it was annexed ; and, consequently, whenever one was divested of the estate, his title of honour behoved to cease." Ibid. § 84.—" 'Tis plain that the ancient feudal Peerage, as all other territorial dignity, could not be enjoyed by any other than those having a right to the lands and baronies

baronies to which the same was annexed. But this is long since antiquated, and Peerage is become a personal dignity." I. 2. § 30.

" In these Gothic constitutions, honour and dignity were originally annexed to lands and offices, and in no case to persons or families, independent of lands or offices."—" The case would be different, when the Earldom or Barony was disposed whole and entire ; for there the honour, for many ages, was certainly transmitted with the estate."—" It is clear, from what is above said, that both of them were once territorial dignities, and that, when the estate was aliened, the dignity went along with it."—" The honour of a Baron by tenure was annexed to the land, and went with it to the purchaser of the Barony along with the jurisdiction and its other accessories." Essay, HONOUR, DIGNITY.

N O T E [E.] p. 65.—70.

Other instances, which prove that nobility and titles were implied in lands raised to them, and accompanied the noble fiefs.

ON the 25th of July, in the 39th of David II. George Dunbar, who March.
is remarked for the singular fortune which constantly attended his party in war, on the resignation of his father Patrick Earl of March, obtained from that king a charter of the estate or Earldom of March ; and in six months, to wit on the 8th of February after, in another charter, you will find him styled George Earl of March. But Douglas, in his Peerage *, says, that Patrick died in 1360 : If so, the case is only an example of a nobleman who did not assume his title till his right to the estate had been completed.

* P. 441.

completed.—Record of charters, B. 1. No. 196. 244.—Fordun, xv. 32.
—Ad. Cafe, ch. 4. p. 43.

Caithness.

The famous Walter Stewart, (youngest son of Robert II. by his second wife Eupham Rofs) having got a grant of the Earldom of Caithness, bore the title corresponding to it; but resigned the estate to his son Allan, who obtained from James I. a charter of it to himself and the heirs-male of his body; in their default, to return to Walter and his heirs general. In consequence Walter ceased to be Earl of Caithness, and the title was carried by Allan even during his father's life. In 1431 Allan Earl of Caithness was killed in a battle fought by him and the Earl of Marre at Innerlochy in Lochaber, with Donald Balloch and the other partizans of Alexander Lord of the Isles; and on his death, without issue, the Earldom reverted to Walter, by whom the title was re-assumed. Fordun, xvi. 17.—Boet. xvii.—Major, vi. 13.—Buchanan, x. 33.—Leslie, —Hawthornden, p. 27.—Record of charters, B. 3. No. 74.—Ad. Cafe, ch. 4. p. 44.

Menteith.

In 1427, James I. having deprived Malise Graham of the Earldom of Strathern, erected the lands of Craynis, &c. into the Earldom of Menteith, and by a charter, in which the estate is alone conferred, granted them, incorporated into that denomination, to Malise Graham, and the heirs-male of his body; on their default to return to the crown. In consequence, Malise Graham ceased to bear the title of Earl of Strathern, and assumed that of Menteith. In an instrument, in which he is mentioned among those who, at the redemption of James I. were hostages for payment of the ransom, he is termed Earl of Strathern; but in that, dated in 1427, which relates to his own release from captivity, he is called Earl of Menteith; and this title was carried by his successors till his family became extinct. Charter, 6th September, 1427.----Rymer, xi. 339.----Sup. Cafe, p. 20.—Ad. Cafe, ch. 5. p. 57.----Buchanan, x. 48.

Lorn.

Walter Stewart, Lord Lorn, conveyed the Lordship of Lorn to Colin Campbell Earl of Argyle, one of the Chancellors of Scotland. In 1470,
on

on Lorn's resignation, the Earl of Argyle obtained from the crown a charter of the lands and estate, and, in consequence, among other titles, took that of Lorn. In a charter dated in 1466, Walter is styled Lord Lorn. In the grant of 1470, the Earl of Argyle is described Colin Earl of Argyle, Lord Campbell; but Lord Lorn is one of the titles borne by him in 1472, and is still carried by the family of Argyle. Crawford's Officers of State, p. 44. &c.—Parl. 1489, ch. 39.—Mem. for Lord Lovat, p. 6. 7.—Sup. Cafe, p. 17.—Ad. Cafe, ch. 6. p. 86.—Parl. 1563, ch. 1.—Parl. 1567, ch. 1.—Parl. 1579, ch. 2.—Parl. 1581, ch. 17.—Commission granted by Queen Mary, in 1566, to publish the Scottish Statutes.

In 1467, Thomas Boyd, eldest son of Robert Lord Boyd, married Lady Mary Stewart, a sister of James III. and having obtained from that King a charter of the Earldom of Arran, became Earl of Arran. But the sovereign ascendant, which, erected on the unstable foundation of the frivolous accomplishments of his brother Sir Alexander, Lord Boyd had acquired over a weak Prince, soon exciting universal envy, was not of long duration. Lord Boyd, obliged for safety to fly into England, died at Alnwick in Northumberland: The Earl of Arran, who had been sent ambassador to Denmark, after, on his return to the Frith of Forth, having made a narrow escape, was condemned by parliament, and the Earldom of Arran, which had been forfeited by his treason, was seized by the crown. During all the vicissitudes of his adverse fortune, his Countess maintained an inviolable attachment to his person; but after his death, was at last persuaded, in 1474, to marry James Lord Hamilton, to whom Hawthornden says the Earldom of Arran was given in dowry with her. Hence the family of Hamilton acquired right to the dignity of Earl of Arran; a title by which they were long distinguished, and which is still retained by them. Buchanan, xii. 26. &c.—Hawthornden, p. 111. 115. &c. 218. 219.—Pitcottie, p. 101.—Crawford's Officers of State, p. 313.—Abercrombie, V. ii. p. 396. 407. &c.—Parl. 1475, ch. 79.

NOTE

NOTE [F.] p. 73.—79.

Before 1587 Territorial Honours were descendible with the noble fiefs to heirs-female as well as to heirs-male.

Buchan.

ON the death of Fergus Earl of Buchan, the title as well as the estate went to his daughter Marjory, who married William Cumin; and both were transmitted from her to their son Alexander Cumin, who was Earl about the middle of the thirteenth century. Chart. of St Andrew's, p. 378. 379. 380. 381.—Chart. of Aberbroth. v. i. p. 6. 10. 22. 63. 81. 190.—Chron. of Melrose, ad ann. 1233.—Ad. Case, ch. 5. p. 6.—Rymer, ii. 200. 205. 266. 471. 772.

Angus.

On the death of Malcom Earl of Angus, both the Earldom and the honours devolved to his only child Matilda, who married Gilbert de Umfraville, an Englishman by descent; and were transmitted from her to their son Gilbert de Umfraville, by whom, during the reign of Robert I. the estate, and in consequence the dignity, were forfeited for his attachment to the party of Baliol. But, as that forfeiture could not operate out of Scotland, the title of Earl of Angus was still retained in England by the family of Umfraville. Chart. of Aberbroth. v. i. p. 28. 52. 53. 75.—Chron. of Melrose, ad an. 1243.—Coke, 4 Inst. p. 47.—Rymer, ii. 1082. iii. 52. 94. 160. 192. 201. 271. 411. 553. 698. 953. iv. 103. 694.—Dugdale, v. i. p. 505. v. ii. p. 505.—Ridpath, p. 380.—Mackenzie's Cond. p. 1. and Lovat's Answers to it, p. 2.—Ad. Case, ch. 5. p. 11.

Athole.

In 1242, on the death of Patrick Earl of Athole, the Earldom, in default of heirs of his body, went to his mother's sister Fernelith, wife of David

David de Hastings, and from them passed to their only child Adda, who married John de Strathbolgie. Both the estate and the title were enjoyed by their descendants, till David their great-grandson was attainted by Parliament in 1323. Fordun, ix. 59. xiii. 22. 25. 36.—Chron. of Melrose, apud Gale, p. 206.—Chart. of Dunfermline, v. 2. p. 24.—Mackenzie's Cond. p. 1. and Lovat's Answers to it, p. 4.—Ad. Cafe, ch. 5. p. 8.—Rymer, II. 266. 280. 776. III. 404. 587. IV. 616. 136. 437.

On the death of Donald Earl of Lennox in 1372, without male issue, the Earldom went to his only daughter Margaret Countess of Lennox, from whom both the title and the estate were conveyed to her son Duncan Earl of Lennox. The heir-male of the family (for an heir-male is affirmed then to have existed, and to exist still) did not pretend to the honours. Mackenzie's Cat. p. 6. and Cond. p. 9.—Chart. of Lennox, No. 13. 15. Ad. Cafe, ch. 5. p. 39.

Lennox.
1372.

Sir Thomas Randolph, the famous regent *, was succeeded in the Earldom of Murray, first by his eldest son Thomas, then by a younger son John Randolph, Earl of Murray, one of those who were slain in 1346 at the battle of Durham. In the original grant made by Robert Bruce, the Earldom, in default of heirs-male of the body of Sir Thomas Randolph, had been limited to return to the Crown: but that devise was alterable; and on the death of John without issue, the honours, as well as the estate, probably in consequence of a settlement executed by him, went to his sister Agnes, the famous Countess of Patrick Dunbar Earl of March, who, with heroic bravery, defended the castle of Dunbar against the forces of Edward III. It is probable that the Countess and her husband, wishing to preserve distinct representations of their families, made a partition of their estates; the Earldom of March was given to their eldest son George; but Agnes settled the Earldom of Murray on her second son John Dun-

Murray.
1346.

O o

bar,

* P. 59. above.

bar*, who married Marjory Stewart, a daughter of Robert II. and to whom, in consequence, that Prince granted a charter of it. Charter of Murray.—Fordun, xiii. 40. xiv. 36. 53.—Boet. xv. p. 335. xvi. p. 340.—Major, v. 15. 24. vi. 3.—Buchanan, ix. 25. 56. 59.—Mackenzie's Cat. p. 9. and Cond. p. 12.—Lovat's Answers, p. 20.—Dalrymple's Collections, p. 345. 346.—Pitfcottie, p. 47. 48.—Rymer, vii. 338. 434. 565. 737.

N O T E [G.] p. 87.—90.

Titles were allowed by courtesy to husbands in consequence of marriage.

Buchan.
Before 1233.

ABOUT the beginning of the thirteenth century, Marjory, Countess of Buchan, married William Cummin: Her husband got the title of Earl of Buchan. Chart. of St Andrews, p. 378. 379. 380. 381.—Chron. of Melrose, ad an. 1233.—Ad. Cafe, ch. 9. p. 5.

Angus.
1240.

John Cumin, who married Matildis Countess of Angus, was termed Earl of Angus. Chron. of Melrose, ad an. 1242.—Ad. cafe, ch. 5. p. 11. ch. 7. p. 170.

Athole.
1231.

Thomas of Galloway espoused Isobel Countess of Athole, and was styled Earl of Athole. Fordun, ix. 48.—Sir James Dalrymple's Collections, p. 379.—Collection of charters in the Advocates Library, No. 60.—Ch. Dunfermline, fol. 82.—Mackenzie's Cat. p. 1. and Cond. p. 4.—Ad. Cafe, ch. 5. p. 6. ch. 7. p. 171.

1242.

David de Hastings, who married her sister Fernelith Countess of Athole, bore the title of Earl of Athole. Chron. of Melrose, ad an. 1242, in Gale, p. 206.—Ad. cafe, ch. 5. p. 9. ch. 7. p. 171.

Their

* P. 61. above.

Their daughter Adda, Countess of Athole, married John de Strathbolgie. In consequence her husband became Earl of Athole. Sir J. Balfour's M. S. Collections.—Rymer, ii. 266. 280. 1269.

Robert Bruce, who married Margaret Countess of Carrick, was Earl of Carrick in right of his wife. Fordun, x. 29. xi. 13.—Winton's Chronicle, c. 139.—Chalmer's Origine des Ecoffois, p. 153.—Rymer, ii. 84. 86. 126. 248. 266. 471. 611. 612. 614. 643. 799.—Ad. Cafe, ch. 5. p. 18. ch. 7. p. 172. Carrick. 1270.

On the death of John Randolph Earl of Murray, the Earldom of Murray devolved to his sister, black Agnes, the gallant Countess of March. On that event her husband, Patrick Dunbar Earl of March, added the style of Murray to his own title of Earl of March. Mackenzie's Cat. p. 9. and Cond. p. 12.—Lovat's Answers, p. 20.—Pitcottie, p. 47.—Dalrymple's Collections, p. 345. Murray. 1346.

Sir William Ramfay, who married Isabel Countess of Fife, bore the title of Earl of Fife. Charter of David II. 20th of August 1359.—Sibbald's History of Fife, p. 97. Fife. About 1350.

Walter de Faflane married Margaret Countess of Lennox, and, in a charter granted in 1384 by Robert II. is admitted by the Sovereign to be Earl of Lennox. Chart. of Lennox, No. 13. 15.—Ad. Cafe, ch. 5. p. 38. ch. 7. p. 175. Lennox. Before 1384.

Margaret Marre, Countess of Marre, married William Douglas Earl of Douglas. Her husband was thence styled Earl of Marre as well as Earl of Douglas. Record of charters, Roll 5. No. 91. &c.—Ad. Cafe, ch. 5. p. 36. ch. 7. p. 175.—Rymer, vii. 175. Marre. 1379.

Euphame Countess Palatine of Strathern, a grand-daughter of Robert II. married Sir Patrick Graham, who, on his marriage, was dignified with Strathern. 1414.

with the pompous title of Earl Palatine of Strathern. Charters, 28th March 1414; 8th October 1414; 10th August 1418.—Dalrymple's Collections, p. 377.—Fordun, xv. 23.—Rymer, viii. 544-735.—Mackenzie's Cat. p. 12. Cond. p. 14. and Inform. p. 12. 18.—Lovat's Answers, p. 25. and Remarks, p. 10.—Ad. Case, ch. 5. p. 56. ch. 7. p. 175.

N O T E [H.] p. 94---97.

Before 1587, Territorial Honours became extinct on the partition of the noble fiefs among coheireffes.

Halyburton.

PATRICK Lord Halyburton, who died in 15 , left three daughters, Janet, married to William Lord Ruthven, Marion to George Lord Hume, and Margaret to George Ker of Faudenside; among whom his estates were equally divided by thirds: And either the dignity became extinct, or the fief had never been erected into a Lordship, and the honour had originally been personal. Janet, the eldest, assumed not the title. Her son Patrick, the noted enthusiast, who in 1566 conspired with Lord Darnley to kill David Rizzio, is said, indeed, to have been termed Lord Dirleton; and under this title, as well as that of Ruthven, her grandson William, the High Treasurer, who at his castle of Ruthven seized on the person of James VI. was created Earl of Gowrie: But the dignity of Ruthven belonged unquestionably both to Patrick and to William; and the addition of Dirleton, which, as Dirleton had not been created a Lordship, seems not to have been a proper stile of Lord Halyburton, might perhaps be either a subaltern title conferred on Gowrie, or given them out of a harmless favour, or inserted merely from inadvertency.—Mackenzie's Cat. p. 6. his Cond. p. 9. and his Remarks p. 34.—Lovat's Memor. p. 31. and State, p. 12.

p. 12.---Sup. Cafe, p. 20.---Ad. Cafe, ch. 6. p. 86.---Brief, p. 117. and Appen. Brief, xxi.---Crawford's Officers of State, p. 359.---Parl. 1600, c. 2.

N O T E [I.] p. 113.---117.

Before 1587, Territorial Honours, together with the noble fiefs, were disposable by will.

DUNCAN, the Earl of Fife who in 1346 was made prisoner at the battle of Durham, settled that Earldom, in default of issue of his body, on Allan Earl of Menteith, father of the heiress whom the Duke of Albany married. This settlement, under which the Earldom ought to have descended to the heirs of Menteith, was afterwards confirmed by an indenture executed by Isabel Countess of Fife, only child of Duncan, with Robert Earl of Menteith; and on her death the Earl of Menteith got the title as well as the estate. Sibbald's history of Fife, p. 97.---Ad. Cafe, ch. 5. p. 24. Fife.

In 1370-1, William Ross, Earl of Ross, obtained from David II. a charter, devising the Earldom of Ross, first to the heirs-male of his body; next to his daughter Euphemia, and her husband Sir Walter Lesley, and the survivor of them; then to the heirs general of Euphemia's body; lastly, to his daughter Joanna, and the heirs general of her body; the eldest heir-female excluding a younger, and succeeding without division. That charter proceeded on a resignation, or settlement, made by William, and mentions not the honours; yet the title, as well as the estate, devolved under it to the heirs called to take them. In 1415, Eupham, Countess of Ross, only child of Alexander Lesley, who had succeeded his father Sir Walter, and his mother Euphemia, choosing to exchange the vanities of the world, and the splendour of life, for the austerities of a nunnery, or the pleasures of Ross.

of retirement, made a deed, altering the former destination, and devising the Earldom, in default of heirs of her body, to John Stewart Earl of Buchan, her uncle by the mother, and the heirs-male of his body; then to Robert Stewart, the Earl's brother, and the heirs-male of his body; next to her Sovereign Lord the King, and his heirs, Kings of Scotland. Under this settlement, in which no notice is taken of the dignity, the Earl of Buchan enjoyed both the title and the estate of Ross during his life; and on his death at Vernueil in 1424, James I. took possession of the lands, which, in consequence of the forfeiture of Murdoc Stewart, Duke of Albany, heir-male of Robert Stewart, had devolved to the crown. But the Earldom was afterwards granted by that Prince to Alexander, son of Joanna, by Donald Lord of the Isles; and the honours, as well as the fief, were possessed by Alexander, and by his son John, by whom both were forfeited in 1475. Ad. Case, ch. 5. p. 26.---Boet. L. 16. 17.---Buchanan, x. 32.—Leslie, vii. 258.---Hawthornden, p. 25.---29.---Parl. 1476, ch. 87.---Parl. 1587, ch. 30.—Rymer, xi. 474.---483. &c.

N O T E [K.] p. 166.—168.

In ancient records are still to be found some instances, in which, perhaps, personal honours, before 1587, descended to heirs-male, exclusively of heirs-female who, on account of propinquity, should have been preferred in the ordinary course of legal succession. But it is probable that in these cases their fiefs either had been raised to correspondent dignities, or went to the heirs who inherited the titles.

Home.
1516.

In 1516, Alexander Hume, Lord Hume, Great Chamberlain of Scotland, was executed for high treason, and his lands were then forfeited to the crown: In 1542, the forfeiture was rescinded by an act of justice in parliament,

parliament, and the family was soon restored both to its honours and to its estates, which on this restitution would probably be granted to the person who should have inherited them in case they had not been confiscated. They went not, however, to Janet, Alexander's daughter, or to her heirs, but were granted to George, his brother and heir-male. The estate, which probably had then been erected into a Lordship, stood devised to heirs-male. Mem. for Lord Lovat, p. 7. and his State of Instances, p. 2.---Sup. Cafe, p. 9---18.—Ad. Cafe, ch. 6. p. 88.---Brief, p. 226.—Crawford's Officers of State, p. 324.

The title of Gray seems to have originally been a personal, as well as an ancient one: Noblemen, possessed of it in the fifteenth century, are mentioned in record: But the fief belonging to the family appears not to have been ennobled even in 1524. In 1541, Patrick Gray, Lord Gray, died, leaving several daughters; and on his death the dignity descended to his nephew and heir-male, Patrick Gray. Indeed, the fief also went to him, but had not then been incorporated into a Lordship. Parl. 1457, ch. 68.---Lovat's State of Instances, p. 8.---Sup. Cafe, p. 19.---Ad. Cafe, ch. 6. p. 80.---Brief, p. 126.

Gray.
1541.

James Fleming, Lord Fleming, was one of nine commissioners, who, in 1557, were deputed to Paris by the states of Scotland * to assist, on the part of the Scots, at the nuptials of Mary, their young Queen; an event celebrated by Buchanan in one of those difficult pieces of composition, in which spirit and delicacy are seldom united, and success is rare on that account †. The noblemen employed in that business, neither condescending to confer on the Dauphin the honours demanded for him by the court of France,

Fleming.
1558.

* Parl. 1548, ch. 4.—Parl. 1557, ch. 1. 2. 3.—Keith, p. 72. &c.—Appen. p. 18.—Buchanan, xvi. 13. &c.

† Francisci Valesii et Mariae Stuartae, Regum Franciae et Scotiae, Epithalamium: A work, which, unpromising by its title, is little known, yet is, perhaps, the most classical poem written by any modern in the Latin language.

France, nor engaging to support his pretensions to them in the parliament of Scotland, their lives, it is shrewdly suspected, were attempted with poison. Three of them, the Earl of Caillies, the Earl of Rothes, and the Bishop of Orkney, were seized on their journey with sickness, and died at Diepe. Lord Fleming, alarmed at their fate, returned hastily to Paris, but survived only a few days. On his death in 1558, his title, which appears to have been personal, descended not to his daughter Jean Fleming, whose mother, a daughter of the Duke of Chatelherault, was nearly related to the crown, and who had married Lord Thirlestane, Chancellor of the kingdom. The dignity went to his brother John Fleming, the Great Chamberlain, still remembered for his steadiness to the party of the Queen, who held for her the castle of Dumbarton several years after imprudence and crimes had expelled her from the throne. The ancient estate of the family had also been settled on him by James; but seems still to have been a barony in 1583, and was erected into the Lordship of Cumbernauld only in 1588: And Lady Thirlestane, in the character of heir general of her grandfather, took no more than Thankerton and Biggar; a parcel of land, which, probably from want of right, James could not convey, as at his death they remained still vested in the person of his father Malcolm. Mem. for Lord Lovat, p. 10.; and State of Instances, p. 5.—Parl. 1593, ch. 192.—Sup. Cafe, p. 17. 26. 28.—Ad. Cafe, ch. 6. p. 90. 112.—Brief, p. 142.—Crawford's Officers of State, p. 328. 329. 152.—Anderson's Diplomata, 68.

Errol.

Most of the ancient Earldoms of Scotland, I believe, were territorial honours; and I dare not affirm positively, that the dignity of Earl of Errol was originally personal: Yet this title seems to have been conferred by James II. about 1455, on William Hay *, High Constable of Scotland; and

* Hawthornden, p. 90. 95.—Pitcottie, p. 93. 105.—Parl. 1457, ch. 68.—The office of High Constable of Scotland had been given, in 1315, to his progenitor, Sir Gilbert Hay, and his heirs, in perpetual fee, for his fidelity to Robert Bruce; Anderson's Diplomata, No. 46.—Dalrymple's Collections, p. 348.

and the old estate, reported in our legends to have been bestowed on his brave ancestor by Kenneth III. for his gallant behaviour at the battle of Loncarty, and which Buchanan asserts still belonged, even in his days, to that respectable family *, is denominated in a charter granted in 1535, by James V. to George Hay of Logie-Almond, the lands and Lordship of Errol: But in another charter, granted in 1542 to Andrew Hay a son of George, you will find it described under the appellation of the Earldom and Barony of Errol. William Hay Earl of Errol died before 1535, and on that event his title went not to his daughter Jean Hay, but to George Hay his first cousin and heir-male. It is true that Andrew, son of George, married Jean, only child of William; and by this marriage all disputes about the succession must have been either prevented or terminated. Lovat's Ad. Cond. p. 8.—Sup. Cafe, p. 18.—Ad. Cafe, ch. 6. p. 99.—Brief, p. 128.

It seems not to be certain, yet it is probable, that the dignity of Rofs of Halkhead was originally personal. The lands of Melvil had not been erected into a Lordship in 1508; and noblemen, denominated Lords Rofs, existed before the year 1500. In 1548, I observe the estate termed a Dominium, but dare not assert that a Lordship, or more than a Barony, is there understood. Ninian Rofs Lord Rofs of Halkhead had two sons, Robert and James. The former, having been killed in 1547 at the battle of Pinkie, died before his father without male issue, and left a daughter Jean, whom Lord Fleming married: But, on Ninian's death, the latter succeeded to the title. James Lord Rofs was one of the noblemen who, in 1567, composed the jury on the trial of the Earl of Bothwell. His father had already executed a settlement, under which the Lordship, or lands and barony, were vested in himself for life, and in James in fee. The estate was accordingly enjoyed by James. Lovat Mem. p. 14.—Mac-kenzie's Answers, p. 15.—Gordon Cafe, p. 13.—Sup. Cafe, p. 25.—Ad. Cafe, ch. 6. p. 94.—Brief, p. 134.—Keith, p. 377.—Note [N.] below.

Rofs.

P p

N O T E

* Buchanan, vi. 33.—Boet. xi. p. 236. 237.

NOTE [L.] p. 189.—204.

Instances which shew, that after 1587 Peerages were descendible only to heirs-male.

Angus.
1588.

ARCHIBALD DOUGLAS Earl of Angus died in 1588, leaving two sisters, Margaret and Elisabeth, who were both married to powerful husbands; but his Peerage went to his heir-male, Sir William Douglas of Glenbervie, a distant cousin. Sup. Cafe, p. 21.—Ad. Cafe, ch. 6. p. 103.—Brief, p. 130.—Ad. Cond. of Lord Lovat, p. 6.

Hay of Yester
1591.

William Hay Lord Hay of Yester, who died in 1590 or 1591 without male issue, left several daughters; but none of them succeeded to his honours. Either the Peerage became extinct on his death, and was a-new granted by the crown to his brother James, or James took it by inheritance. Lovat Mem. p. 12.—Mackenzie's Answers to it, p. 13.—Lovat's State of Instances, p. 6.—Sup. Cafe, p. 17.—Ad. Cafe, ch. 6. p. 90.—Brief, p. 127.

Perth.
1611.

James Drummond Earl of Perth died in 1611 without male issue, and the Peerage descended not to his daughter Lady Jean Drummond, whom John Earl of Sutherland married, but went to his brother John Drummond, grandfather of that nobleman who was Chancellor of Scotland during the reign of James VII. Crawford's Officers of State, p. 233.

Crichton of
Sanquhar.

Robert Crichton, Lord Crichton of Sanquhar, having employed two mean ruffians, Robert Carlyle and James Irving, to perpetrate in London a base assassination on John Turner a fencing-master, was arraigned in the King's

King's Bench at Westminster for that atrocious murder; and having on his trial been found guilty by an English jury, the high rank of the criminal, the solicitous intercession of his friends, the sullied honour of his family, the native partiality of his Sovereign, all availed not to prevent the completion of that which David Hume terms a laudable act of justice on the noble convict. In 1612 Lord Sanquhar was executed in Palace-Yard, and fortunately died without issue. He had indeed a sister, who was married to Grierfon of Bargattan: But the Peerage went to his cousin William Crichton of Rayhill. State Trials of the year 1612.—Hume, vi. 46.—Lovat Mem. p. 8.—His State of Instances, p. 3.—Mackenzie's Answers, p. 7.

June 27.
1612.

William Rofs, Lord Rofs of Halkhead, died in 1648 without issue; but he left two sisters, Mary married to Sir Henry Innes of Innes, and Jean married to John Hepburn of Wauchton. The Peerage, however, instead of devolving to either of them, went to his grand-uncle and heir-male William Rofs, in whose descendants the dignity subsisted till it became extinct in 1754. Lovat Mem. p. 15.—His State of Instances, p. 7.—Sup. Case, p. 17.—Ad. Case, ch. 6. p. 94.—Brief, p. 134.

Rofs.
1648.

In 1649 Alexander Elphinston Lord Elphinston died, leaving a daughter Lillias Elphinston, who succeeded to his estate; but the Peerage went to his nephew and heir-male Alexander Elphinston, on whose death in 1654 it was enjoyed, first by his eldest son Alexander till 1669, then by his next son John. Their mother Lillias Elphinston, whom the second Alexander had married, was alive all the time, and if the dignity had been descendible to her, would have excluded them; but it was successively possessed by every one of them. They even sat in Parliament. Lovat Mem. p. 17.—Mackenzie's Answers to it, p. 16.—Lovat's State of Instances, p. 7.

Elphinston.
1649.

In 1488 Alexander Cunningham Lord Kilmaurs, who at the battle of Sauchieburn commanded the left wing of the royal army, and who was
P p 2 killed.

Glencairn.
1670.

killed in that affair, had been raised by James III. a few weeks before the action, to the higher dignity of Earl of Glencairn : And, on the death of Alexander Earl of Glencairn in 1670 without male issue, the Peerage went not to his daughter Lady Margaret Cunninghame, who married an Earl of Lauderdale, and to their descendants, but to his brother John Earl of Glencairn, whose heir-male is at present possessed of it. Hawthornden, p. 156. — Crawford's Officers of State, p. 223. — Lovat's Ad. Cond. p. 22.—Sup. Cafe, p. 18.—Ad. Cafe, ch. 4. p. 64. and ch. 6. p. 107. 119. —Brief, p. 133.—Parl. 2d March 1649.

Marischal.
1670.

William Keith, the Earl of Marischal, who during the civil war distinguished himself by his loyalty to the King, died in 1671 without male issue : But he left four daughters ; Margaret, married first to Sir James Hope of Hopetoun, then to Sir Archibald Murray of Blackbarony ; Mary, to Robert Viscount of Arbutnot ; Jean, to George Lord Banff ; and

The Peerage, however, went to his brother George. Lovat Ad. Cond. p. 11.—Crawford's Peerage, p. 322.

Errol.
1674.

Gilbert Hay Earl of Errol died in 1674 without issue, and on his death the Peerage went not to his sister Lady Margaret Hay, who was twice married, first to Henry Lord Ker eldest son of the Earl of Roxburgh, next to John Earl of Caillies, and who had issue by both her husbands. Either the Peerage descended to his cousin Sir John Hay of Killour, heir-male of the family, or it became extinct, and was revived by a new patent granted on a resignation in his favour. Lovat Ad. Cond. p. 10.—Lovat's Remarks, p. 10.

Morton.
1681.

On the death of William Douglas Earl of Morton without issue in 1681, the Peerage descended not to his sister Lady Mary Douglas, who married Sir Donald Macdonald of Slate, but to his uncle and heir-male Sir James Douglas of Smithfield. Lovat Ad. Cond. p. 11.

Francis

Francis Sempil Lord Sempil died without issue in 1685, but on his death the Peerage did not go to his sister Anne Sempil. Robert Sempil, heir-male of the family, must have been understood to have had a full right to it; but he surrendered to the crown his pretensions, and in consequence of this surrender his Majesty conferred the dignity on Anne Sempil by a patent, which, on a recital of the consent and resignation of Robert Sempil, confirms a settlement of the honours as well as of the estate, which had been made by her father in favour of her and of her heirs-male. Nevertheless, an heir-male, who seems not to have acquiesced in their right, but claimed the Peerage, and even carried the title, still existed in 1729. Lovat's Memor. p. 39.—Lovat's State of Instances, p. 14.—Gordon Appen. p. 14.—Sup. Cafe, p. 18.—Ad. Cafe, ch. 6. p. 95. 114. 124.—Brief, p. 124.—Appen. Brief 6.

Semple.
1685.

John Maitland Lord Maitland died in 1710, leaving an only child Jean; but, on the death of his father John Earl of Lauderdale, who had survived him, the dignity descended to his uncle Charles, next brother and heir-male of the last possessor of it.

Lauderdale.
1710.

On the death of John Fleming Earl of Wigton without issue male in 1743, both his estate and his honour went to his brother and heir-male Charles, not to his daughter Lady Clementina Fleming. Append. 2d to Gordon Cafe.

Wigton.
1743.

NOTE [M.] p. 204.—212.

Cases in which Peerages, territorial or personal, seem to have become extinct, because no heir-male, descended of the Nobleman who had possessed them in the year 1587, was in existence at the devolution of the succession, and to have

have been re-created in some instances, by new patents granted to the proper heirs of them.

Hay of Yester.
1591.

WILLIAM HAY Lord Hay of Yester, who died in 1591 without male issue, left several daughters. Probably, however, the Peerage was understood on his death to have become extinct; for the dignity seems to have been anew conferred on his brother James Hay, who had succeeded to the estate. Mackenzie's Answers, p. 13.—See note [L.]

Athole.
1594.

On the death of John Stewart Earl of Athole, who died in 1594 without male issue, but who left two daughters, the Peerage became extinct; and, by a new patent, was granted in 1595 to John Lord Innermeath, a nobleman who by lineage had no pretensions to it*.

Buchan.
1601.

Perhaps the only instance of an honour originally territorial, which after 1587 descended to an heir-female, is the ancient Earldom of Buchan, and even that instance is not perfectly unambiguous. James Douglas Earl of Buchan †, who died about 1601, left an only child Mary Douglas. This lady was then an infant, and had a good right to the estate. Hence those who managed her affairs, during her minority, assumed for her the title of Countess of Buchan: Under that title her investiture was completed in the Earldom: And Stewart the heir-male, who had sprung from the family before 1587, forebore to assert a claim to the honours. Her pretensions, however, seem not to have been altogether unquestioned. In 1617 her husband James Erskine, a younger son of the Earl of Marre, who was Lord High Treasurer of Scotland, had the precaution to take from the crown a charter, by which the Peerage as well as the estate, together with the privileges belonging to it, is granted to him under the royal hand: On account of his connexion with the heirs of the family, he had some natural claim to possess the honours belonging to it: And it is

* P. 199. above.

† P. 90. above

is remarkable that they are not there limited to her heirs, but devised to the heirs-male of James Erskine the Earl. Not a word in favour of the heirs-male either of the Douglasses or of the Stewarts, the ancient Earls of Buchan, who, one should almost imagine, had even then been perceived not to possess any right to the dignity. Sup. Cafe, p. 32.—Ad. Cafe, ch. 5. p. 63.—Brief, p. 110.

Andrew Gray Lord Gray had an only child, Anne, who, with the consent of her father, married William Gray of Pittendrum about 1628; and, on Lord Gray's death, the Peerage should have become extinct for want of heirs of the blood entitled to inherit it. Hence, on his Lordship's application, King Charles I. granted a new patent, conferring the dignity on William Gray and his heirs-male by Anne Gray, after the death of her father, together with the title and the rank of Master of Gray before it. Sup. Cafe, p. 19.—Ad. Cafe, ch. 6. p. 93.—Parl. 1641, c. 248. 270. (not printed.)

Gray.
1663.

On the death of Charles Stewart Duke of Lennox without issue in 1672, the dignity went not to his sister Lady Catherine Stewart wife of Lord O'Brien, but, merging in the crown, became extinct. See p. 200. above.

Lennox.
1672.

John Lord Borthwick, who died in 1672, left heirs-female descended of his father; but they did not pretend to the Peerage. His heirs-male, too, who were sprung from the family before 1587, did not claim it, and the dignity was long understood to be extinct. A claim, indeed, entered at the distance of fourscore years, by Henry Borthwick Esquire, was adjudged by the House of Lords in 1762 to be good*; and I must forbear to investigate either the truth of the facts, or the solidity of the principles, on which, without a competitor, his pretensions were maintained.

Borthwick.
1672.

In 1676 John Lord Sinclair died without male issue; but he left a daughter, Catherine, to whom the Peerage did not go. The dignity became extinct;

Sinclair.
1676.

* P. 204. above.

extinct; and in 1677 Charles II. by a new patent, promoted her son Henry Sinclair to the honour of Lord Sinclair. Lovat Mem. p. 38.—His State of Instances, p. 15.—Mackenzie's Remarks, p. 36.

Menteith.
1694.

The dignity annexed to the Earldom of Menteith was descendible in old times to heirs-female. Towards the end of the seventeenth century, the family which had last held it failed in the person of William Graham Earl of Menteith; but genealogists affirm that heirs-male, descended from its ancient Lords before the year 1587, are still in being: The Peerage, however, has not been claimed by any of them, and is commonly supposed to be extinct. CRAWFURD.—DOUGLAS.

Wigton.
17 .

On the death of Charles Fleming Earl of Wigton without issue in 17 , the estate went to his niece Lady Clementina Fleming; but the Peerage descended not to her, and is generally supposed to have become extinct.

Rofs.
1754.

William Rofs Lord Rofs of Halkhead died without issue in 1754, but left three sisters, of whom the eldest succeeded both to the fief of Halkhead and to the estate of Melvil. The Peerage became extinct.

N O T E [N.] p. 267.—268.

Jury empan-
nelled on the
trial of the
Duke of Al-
bany in 1425.

THE jury which sat in 1425 on the trial of the Duke of Albany, of the Earl of Lennox, and of the sons of the Duke, consisted of the following persons, of whom several were commoners: *Quorum vicissim una et eadem affissa fuerunt, Walterus Stewart de Athole patruus Regis, Archibaldus tertius hoc nomine de Douglas, Alexander Stewart de Marre, Willielmus Douglas de Angus, Willielmus de Sancto Claro de Orkney, Alexander Insularum de Rofs, et Georgius de Dunbar Marchiae, COMITES; Jacobus Douglas de Balvany, et Robertus Stewart de Lorn, DOMINI; Johannes*

Johannes de Montegomorri ejusdem, Gilbertus de Hay de Errol constabularius Scotiae, Thomas Somerville ejusdem, Herbertus Herrice de Terreglez, Jacobus de Douglas de Dalketh, Robertus Conyngham de Kylmauris, Alexander Levynston de Kalendar, Thomas Hay de Lochorwart, Willelmus Borthwick ejusdem, Patricius Ogilvie vice-comes de Angus, Johannes Forrester de Corstorphin, et Walterus Ogilby de Lunchrethin, MILITES. Fordun, xvi. 10.—Major, vi. 12.—Sir George Mackenzie's Works, ii. 275.—Crawford's Officers of State, p. 310.

In 1481, Robert Lord Lile was tried in “ a Parliament of King James III. holden at Edinburgh 13th March 1481—22 Martii, quinto die Parliamenti, Domino Rege sedente in trono Justitiae—Assissa: Comes Atholiae, Comes de Morton, Dominus Glammis, Dominus Erskine, Dominus Oliphant, Dominus Cathkert, Dominus Gray, Dominus Borthwick, Dominus de Stobhall, Dominus de Drumlanrig, Dominus Maxwell, Willielmus Borthwick Miles, Alexander Magister de Crawford, Silvester Ratray de eodem, Robert Abercrommy de eodem Miles, David Moubray de Barnbogle Miles.—Accusatio super Roberto domino Lile per Rotulos, ut sequitur. Robert Lord Lile, you are delated to the King's Highness, that you have sent letters in England to the traitour James of Douglas, and to other Englishmen, in treasonable manner, and also received letters from the said traitour and from other Englishmen in treasonable manner, and in furthering of the King's enemies of England, and prejudice and skaith to our Sovereign Lord the King, his realm and lieges.—Quae assissa superscripta, in presentia supremi Domini nostri Regis Jurata, et de ipsius Mandato super dictam accusationem cognoscere per eundem supremum dominum nostrum Regem mandata, remota et re-intrata, deliberatum est per os JOANNIS DRUMMOND DE STOBHALL, nomine et ex parte dictae assissae et prolocutorio nomine ejusdem, dictum Robertum dominum Lile quietum fore et immunem et innocentem accusationis et calumnationis superscriptae: Super quibus dictus Robertus dominus Lile petiit notam Curiae Parliamenti, et testimonium sub magno sigillo ejusdem domini Regis, sibi dari super praemissis; quod quidem testimonium idem dominus Rex sibi concessit,

Lord Lile,
in 1481.

Q q

darique

darique mandavit eidem in forma superscripta et consueta." Appendix to Historical Law Tracts.—Arnot, p. 643.

The Earl of Bothwell, in 1567.

In 1567 the Earl of Bothwell was tried for the murder of Henry Stewart Duke of Rofs, husband of Queen Mary, by a jury consisting of, Andrew Earl of Rothes; George Earl of Caithness; Gilbert Earl of Caillis; Lord John Hamilton, commendator of Arbroth, son to the Lord Duke; James Lord Rofs; Robert Lord Semple; John Maxwell Lord Herries; Laurence Lord Oliphant; John, Master of Forbes; John Gordon of Lochinvar; Robert Lord Boyde; James Cokburne of Lantown; John Somerwel of Cambusnethan; Moubray of Barnbougall; Ogilvie of Boyne. Anderson's Collections, ii. 112.—Spotfwood, p. 201.—Keith, p. 375. 376. 377.

The Earl of Morton, in 1581.

In 1581 the Earl of Morton, who had been Regent of Scotland, was tried by a jury, of which the Laird of Wauchton made one. Crawford's Officers of State, p. 115.

The Earl of Gowrie, in 1584.

In 1584 William Ruthven Earl of Gowrie, himself a conspirator, and son of one as well as father of another, was tried at Stirling before John Graham, a justice, by a jury consisting of the Earls of Argyle, Crawford, Montrose, Glencairn, Eglinton, Arran, and Marischal; of Lords Seton, Somervell, Down, Livingston, Drummond, Ogilvie, and Oliphant; and of Murray of Tullibairden. Cromarty's Account of Gowrie's Conspiracy, p. 13.—Crawford's Officers of State, p. 390.—Parl. 1584, ch. 18.

Lord Balmerino, in 1609.

In 1609 James Lord Balmerino, a Secretary of State, was tried before the Justice General, and found guilty by a jury, which consisted of David Earl of Crawford, George Earl of Marischal, John Earl of Wigton, Patrick Earl of Kinghorn, John Earl of Tullibairdin, Allan Lord Cathcart, John Lord Salton, David Lord Scoone, Alexander Lord Garlies, William Master of Tullibairdin, Sir James Douglas of Drumlanric, Sir Robert Gordon of Lochinvar, Sir William Livingston of Kilsyth, Sir John Houston of Houston, and Sir Patrick Hume of Polwarth. Spotfwood, B. 7. p. 511.



